United States Court of Appeals for the Second Circuit



APPELLANT'S APPENDIX

74-1889 B/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1889

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff-Appellant,

-against-

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, GAZOCEAN U.S.A., JOHN DOE and RICHARD ROE, JOHN DOE CORPORATION and RICHARD ROE CORPORATION, the names of the defendants, JOHN DOE, RICHARD ROE, JOHN DOE CORPORATION, and RICHARD ROE CORPORATION being fictitious, their real names and identities presently unknown to the plaintiff,

Defendants.

GAZOCEAN INTERNATIONAL, S.A., GAZOCEAN FRANCE, PETROMAR SOCIETE ANONYME, and MUNDO GAS, S.A.,

Defendants-Appellees.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO APPELLANT'S BRIEF

BURNS, VAN KIRK, GREENE & KAFER 521 Fifth Avenue New York, New York 10017

Attorneys for Plaintiff-Appellant



PAGINATION AS IN ORIGINAL COPY

APPELLANT'S APPENDIX

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EXHIBITS

The following were submitted to Judge Knapp, but he did not file them with the Clerk, so they are not part of the record. They are submitted here as exhibits.

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CIVIL DOCKET UNITED STATES DISTRICT COURT

Jury demand date:

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Action arose at:	Depositions						
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Allie Yayon



DATE	PROCEEDINGS	Date Order of Judgment No.
Sept . 25-	9 Filed complaint and issued summons.	
Oct . 23-6	Filed summons and return. Served:	
	Societe Anonyme De Gerance et D'armement by Mr. Daridan on 10/1/69.	
	Gazocean USA by Mr. Welbron on 10/6/69	
Oct .276	Filed Notice of Appearance for deft. Gazocean USA Inc.	
Oct.28.69	Filed stipulation and order extending deft. Gazocean USA Inclusion to answer complaint to 11/30/69. So ordered, Weinfeld, J.	
Dec . 3-69	Filed stip. and order extending time for deft. Gazocean to answer complaint to 12/15/69. Frankel, J.	
Dec .15-69	Filed ANSWER of deft. Gazocean.	SSF&F
Dec .16-69	Filed Notice of Motion re: Dismiss complaint. Ret. 1/6/70, tog. with affidavit in support thereof.	
Dec .16-69	Filed Memorandum in support of motion to dismiss	
Jan.5-70	Filed stip. adjourning motion to dismiss to 3/10/70.	
ar.9-70	Filed stipulation adjourning motion now ret. 3/10/70 to 1/11/70.	
pr.14-70	Filed (in court.) Reply Memorandum in support of motion to dismiss (Also in 69 C	- 1222)
ime 23-70	Filed OPINION #36892. MacMahon, J. Defendant's motion to dismiss both complaints	V. HEZE
	is denied, and defendant's motion to stay the first action (69 Civ. 4222)	
	pending arbitration is granted. So ordered. (mailed notice) (Also in 69 Civ.	1.222)
pr-14-70	Filed (in court) Notice of filing of affidavit of Dr. Paul Krayer.	WEEL).
pr-14-70	Filed (in court) Reply Affidavit in support of motion to dismiss complaint, etc.	
pne 23-7	Filed MEMO. END. on motion papers filed 12/16/69. See opinionfiled this date.	
	MacMahon, J.	
1 23-70	Filed Notice of Appeal by Societe Anonyme de Gerance et D'Armement (mailed copy	
nl 23-70	Filed Undertaking for Costs on Appeal (\$250. National Surety Corp.)	
Mar 31-70	Filed pltff's brief in opposition to motion to dimiss	
Mar 31-70	Filed affdyt in opposition to motion to dismiss	
ept 1-70	Filed notice that the record on appeal has been certified and transmitted to the	
	U.S.C.A. for the 2d Circuit this 1st day of Sept. 1970.	
pr 12-71	Filed deft's affdvt & order to show cause to amend memorandum decision of 6-23-70 ret. 4-13-71	
pr.27.7	Filed MemorandumDeft's motions to amend our order of June 23, 197	0
	to include certification of the aformentioned question for appear	1
	is in all respects granted. Settle order on notice within ten(10	15
	days. MacMahon, J. (Entered in 69Civil 4222)	
pr.27.71	Filed Benjamin Gassman, affdvt. for pltff. in opposition to the	
	motion by deft. Societe Anonyme De Gerance et D'Armement, for an	
7	order amending the memorandum order and decision .	
By 7-71	Filed Memo Endorsed on unsigned order Resettle order within ten	
	(10) days setting forth specifically the question to be certifi	ad
	for appeal in accordance with our memorandum decision of April	Eu
	27, 1971. MacMahon, J. M/N	
lav 19-7	1 Filed order that motion of deft Societa Angeres De Carres Pe	
	1 Filed order that motion of deft. Societe Anonyme De Gerance Et D'Armement to amend the memorandum decision and order of this	
	court dated June 23, 1970 is granted. Ordered, that said deft.	
	be granted leave to apply for the U.S.C. of Appeals within ten	
	(10) days from the entry of this order for permission to appea	1
	form so much of this order as denies deft's motion to dismiss the complaint erc. MacMahon, J. (Filed in 69-4223) M/N	
ec. 17-71	Filed true copy of U.S.C.A. Ordered that the order of District Court is	
	affirmed in accordance with the opinion of this court. JUDGMENT ENT. 12-17	-71
		=
lan 3-72	Clerkmailed notice. Filed stip and order that time for deft Societe Anonyme de Gerance et D' Armenen to Answer the complaint is extended to 2-15-72 Pierce J.	t
	CONTINUED on page #3	
	CON TNUED OIL Page 153	

1, 110 Rev. C	Civil Docket Continuation	1.
DATE		Date Order of Judgment No
Feb. 18-	72 Filed stip and order that time for deft Societe Anonyme de Gerance et D' Armento answer the complaint is extended to 3-15-72 MacMahon J.	ent
Mar 17-72	The state of the s	
Apr24-72	Filed stip & order that the time for the deft. Societe Anonyme de Gerance et D'Arment to answer the complaint is hereby extended to 5-15-72-so ordered	
	MC LFAN, J.	
May16-72	Filed Deft's ANSWER to the complaint (Deft. Societe Anonyme De Gerance et D'armement)	HGP&H
Dec 17-72		
	S.D.N.Y. is affirmed in accordance with the opinion of this Court. Friendly, C.J. Clark, J. Kaufman, J.	1
,	3 Filed Deft Societe Anonyme De Gerance Et D'Ar, emt notice of deposition.	
Peb 23-73	Filed Deft Societe Anonyme De Gerance et D'Armene affdyt & notice of motion for an order requiring Pltff to post security for costs Ret. 3-9-73.	
Feb.23-73 Mary-73	Filed Deft Societe Anonyme De Gerance et D"Arment memorandum of law in support	ment,
	directing the pltff to post security for costs now rtble Farch 9-73 is extended to	
MA: 10=	March 16th, 1973, Knapp, J.	
Mar. 19-	Filed stip & cracr that he depositions of the pltff, several members of pltffs	staff
	to May 1, 1973. Knapp, J.	ed
Mam10-73		-
Platition	Filed stip & order that the motion of deft Societe Anonyme De Gerance Et D: Arm directing the pltff to post security for costs, is adjourned to March 23rd, 1073.	ement
	Knapp. J.	
Mar 23,73	Filed stip adjourning motion Re: security costs until April 13,73.	· · · ·
Apr.4.73	Filed stip and order to change Attys. EIKENBERRY & PETERSON.	
May 25.73		
,	for security for sosts, referred to Magistrate Raby to hear and report,	
	and upon reading and filing the Magistrate report; It is ORDERED, that the	
	motion is denied, without prejudice to renewal upon a showing of	
	noncomplianceby the pltf. with the schedule for pre-trial discovery	
	to be fixed by Magistrate Raby. KNAPP.J. (n/m)	
Jun. 15-73	Filed stip and order adjourning depositions until dates as indicated. fsee	
	stip in file) So Ordered. KNAPP, J.	
Jun _20,73	Filed notice of motion Ret. June 26,73, at 9 a.m. Re: Permitting Pltf. atty	
	to withdraw.	
Jun 22,73	Filed Order to Show Cause; Ret. June. 26,73 At 9 a.m. room 1105; renewing defts.	
	motion requiring pltf, to post security for costs.	1
Ju19.73	Filed ettexanixoxiaxxxaxabaxi consent and order to substitute KIRLIN CAMPBELL &	
7-1 14-73	KEATING as Attys. of record for Eikenberry & Paterson. SO ORDERED. KNAPP I Filed pltff's affidavit & notice of motion for re-argument ret. 7-31-7	13
Jul 10-73	Filed pltff's affidavit & notice of motion for re-argument ret. 7-31-7 Filed pltff's memorandum in support of its motion ret. 7-31-73.	13.
Jul 10-73	Filed pitti's memorandum in support of its motion ret./-31-/3. Filed Memo-Enforsed on deft's Societe Anonyme Show cause order, filed	1
	6-22-73: Motion graned, pltff. to post \$10,000 bond as security, for costs within two weeks. Knapp.J. m/n	•
	Filed Bond undertaking for costs in the sum of \$10,000 as security, for costs.	
Jul . 23-77	Filed deft's Saga's request for production of documents,	
7-1 73-73	Filed " interrogs to pltff. set No. 1.	
11.30-73	Filed affidavit of C.E. Dubuc in opposition to pltff's motion for, reargument.	
Jul_30-73	Filed deft's Societe Anonyme De Gerance memorandum in opposition to pltff's motion for reargument.	
	Cont'd on para #4	

DATE	PROCEEDINGS	Date Or Judgmen
ug. 1-73	Filed Memo-endorsed on pltff's motion filed 7-16-73: Motion to re-	
1	argue denied on the ground that I did not give substantial weigh	t
	to the statement in question, Knapp. J. ///	
ep.21-73	Filed pltff's answers to deft's Daga's interrogs -Set No.1.	
ct.5-73	Filed deft's (Societe Anonyme De Gerance Et D'Armement) affidavit & .	
	CHOW, CAUGE OPDED to dismiss Re. Interrogs ret. 10-12-73.	
ct.5-73	Filed deft's memorandum in support of his motion to strike complaint	•
lov. 16-73	Filed pltff's affidavit & show cause order Re: deposition of pltff,	
	ret 11-13-73	
lov. 16-73	Filed affidavit of C.E. Dubuc in opposition to pltff's affidavit.	
1/ 70	riled months officiatif of D R School to attidavit of hetilations	-
1 16 72	Filed report of U.S. Magistrate h.J. Kaby.	
		!
lov. 16-73	rilad Mome andorsed on nifff's snow cause order: life could haven a	
	moviewed the report of Magistrate Raby dated 11-13-73 & Pitt 3,	
	objection thereto dated the same day, pltff's application is,	
	denied Co ordered Knapp I Mailed notice.	
lov.20-73	Eiled Order for substitution of arrys for Dilli, build, vall Nill,	+
	Greene & Kaser in place of Kirlin, Campbell & Keating. So ordered	1-
	Knapp, J.	-
ov.23-73	Pre-trial held before Magistrate Raby,	+
Dec. 18-73	Filed Certificate of Mailing summons & Complaint by registered Mail	1-
	to Petromar Societe Anonyme 37 Rue Caumartin Gazocean France	+
		+
		+
	Rec.No. 547680 Rec 1-14-74. Paris 8: France Rec.547681 - Received Rec.12-27-	73.
		1
	/Mando/Gas//S/A/ 21 Avenue George V. Belvedere Building Paris France	1
	Hamilton, Bermuda Rec.547683	.1
	Rec. 547682	
Dec 24-73	Filed pltff's memorandum in opposition to deft;s Zaga's motion to,	
Dec. 24-13	dismiss complaint.	
Dec 24-73	Filed affidavit of J.Muller in support of request substituting atty	s.
Dag 2/ 72	Filad mltff's objections to deft's Saga's interrogs.	
Dec. 24-73	Filed affidavit of J.Muller in opposition to motion of deft's to .	
DEC. 24 13	dismiss.	
Ian 9-74	Filed stip & order that time of deft. Petromar Societe Anonyme to	
	to enguer complaint is ext. from 1-/-/4 to /-b-/4. Knapp.J.	
Ten 10-74	Filed stip & order that time for deft. Mundo Gas, S.A. to answer the	4
		+
Jan 15-74	Filed Jurisdictional interrogs to delt. Petromar Societe Anonyme	-
	late to the distance intervence to dott. Mundo was as As	+
Jan. 28-74	TETTO CETTO X. OFFICE THAT TIME TOT LAZOCEAN INCUINGLIGATIONS, O.K. W.	
	Carocean France to answer complaint is ext. to 2"0"/4. Mappin	+
Jan. 23-74	Filed pltff's notice to take deposition of Richard Kirk.	-
Feb. 6-74	Filed deft's Petromar Societe Anonyme affidavit & show cause order,	-
	to dismiss action as to him ret. 2 22-74.	4
feb. 6-74	Filed deft's memorandum in support of motion to dismiss ret. 2-22-7	-
reb.7-74	India da falla Composition Intil & Coroccom France attidavit & Show Caus	-
	The distriction complaint as to them ret. 2-22-14 . Midphi.	+
Reb.7-74	Filed doff's Mundo Cas S.A. attidavit & Show Cause order staying	+
	action as to deft. ret.2 22-74. Knapp, J. Filed deft's memorandum of law in support of show cause order.	+

) Civ.4223 JOSEPH MULLER CORP.VS.SOCIETE ANONYME DE GERANCE ET AIF

	Page #5
DATE	PROCEEDINGS
Feb. 20-74	Filed Pltff's Memorandum in opposition to Motions by Defts Gazocean
feb.22-74	France Gazocean Intnl S.A. Mundo Cas and Petromar to dismiss. Filed reply memorandum in support of deft. Mundo Gas motion to, dimsiss.
feb.27-74	Filed OPINION #40396: There are motions by four deft's pursuant, to rule 41(b) to dismiss for failure to prosecute. The motions'
	are granted & the case dismissed as against deft's, Gazocean France, Gazocean International, Mundo Gas & Petromar.
	Co ordered Veens I mailed notice
Feb. 28-74	Filed affidavit of service by Edward Ma .
Feb. 28 74	Filed Judgment: Order that deft's Gazocean France Gazocean Inter'n Mundo Gas, S.A. & Pettomar Societe Anonyme, have judgment,
May 15-74	Filed ORDER Pursuant to Magistrate's recommendation deft's motion
May 1.3-74	to dismiss is denied and pitff directed to supply addl answers
	in accordance with this order To the extenti not modified by
	this order, Magiatrate's Report is in all respects approved.
Jun.5-74	Filed pltff's memorandum in support of rotion for entry of final ,
Jun.5-74	judgment. Filed pltff's affidavit 2 notice of motion directing entry of final, judgment ret.6-14-74.
Tun 12-74	Filed deft's ('Petromar') memorantum in opposition to pitff's motion,
Juli 12	Re: firal judgment.
Jun. 12-74	Filed deft's Gazocean Inter'l memorandum in opposition to pitff,s,
	motion for a rule 54(b) certificate.
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-	

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOSEPH MULLER CORPORATION ZURICH,
Plaintiff,

69 civil No.: 4223

COMPLAIN

- against SOCIETE ANONYME DE GERANCE ET D'ARMEMENT,

PETROMAR SOCIETE ANONYME, MUNDO GAS, S.A.
GAZOCEAN INTERNATIONAL, S.A., GAZOCEAN FRANCE
GAZOCEAN U.S.A., JOHN DOE and RICHARD ROE,
JOHN DOE CORPORATION and RICHARD ROE CORPORATION,
the names of the defendants, JOHN DOE, RICHARD
ROE, JOHN DOE CORPORATION and RICHARD ROE
CORPORATION being fictitious, their real
names and identities presently unknown to the
plaintiff.

Defendants.

The plaintiff complaining of the above defendants, allege as follows:

FOR A FIRST COUNT

- 1. The plaintiff is a corporation incorporated under the laws of the Swiss Republic and having its principal place of business in Zurich, Switzerland.
- 2. The Societe Anonyme De Gerance et D'Armement (hereinafter referred to as "SAGA") is a Corporation incorporated under
 the laws of the Republic of France, and having its principal place
 of business in parris, France, and operating and doing business
 either in its own name or under the name of an agency and/or
 subsidiary and/or direct representatives, in the City and State of
 New York, in the United States of America.

- 3. Petromar Society Anonyme (hereinafter referred to as "PETROMAR") is a Corporation incorporated under the laws of the Republic of France, and having its principal place of business in Paris, France, and operating and doing business either in its own name or under the name of an agency and/or subsidiary and/or direct representatives, in the City and State of New York, United States of America.
- 4. Mundo Gas, S.A., upon information and belief is a Corporation incorporated under the laws of the United Kingdom, and at all times was doing business and having a place of business in the United States of America, Bermuda, London, England and elsewhere
- 5. Gazocean International is a Corporation incorporated under the laws of the Swiss Republic, and Gazocean France is a Corporation incorporated under the laws of the Republic of France, and the said Gazocean International and Gazocean France are affiliated companies owning stock in each other, and having common directors and officers, and operating as will be hereinafter set for

in the transportation field and transporting among other things through specially built tankers owned, controlled or chartered by the said corporations through either themselves or their subsidiary corporations, throughout Europe, the United States of America and worldwide under a common working arrangement with each other and with the other defendants in this action. The said Gazocean International and Gazocean France have established offices, upon information and belief through a subsidiary and/or affiliated company in the United States of America where they operate as part of the overall complex aforementioned in the United States of America, under a corporate style known as Gazocean, U.S.A., which is a Corporation incorporated under the laws of the State of New York.

6. That the defendants John Doe and Richard Roe, whose first names and last names are fictitious and true names presently unknown to the plaintiff, are persons who were, have been or are acting in concert with the other defendants in effectuating and/or perpetrating the acts which are alleged hereinafter as being part of a conspiracy to violate Title 15 U.S.C., Section 1, et seq., and that the defendants John Doe Corporation and Richard Roe Corporation whose names are fictitious and whose true names are presently unknown to the plaintiff, are similarly Corporations who

were, have been and are acting in concert with all of the defendants in effectuating and/or perpetrating the various acts in the conspiracy set forth hereinafter as having occurred in violation of Title 15, U.S.C. Section 1, et seq.

- That at all of the relevant time herein mentioned, 7. the defendants were and still are operating both in the United States of America and internationally in foreign commerce in the field of transportation of liquified and natural gases known by the names of L.P.G., L.N.G., V.C.M. and by various other names, and are controlled by or through subsidiaries or through private charte in the loading, transportation, unloading and further transportation through the use of the ships and tankers so cwmed, controlled and chartered by them or their subsidiaries or agents or representatives, both in the United States of America, and throughout the world, both in interstate commerce as well as foreign commerce and all of which are related directly or indirectly to activities and/or manufacturing processes in the United States of America and intended either for transport or import from or to the United States of America.
- 8. Jurisdiction of this court is conferred by virtue of Title 15, U.S. Code, Section 1, et seq., and Sections 3 and 7 of the Clayton Act.
- 9. All of the defendants herein in violation of law entered into a combination and conspiracy to place unlawful re-

foreign commerce with the view of fixing parallel costs of transportation of the products hereinafter described between various
ports in the United States and ports in various parts of Europe.

16. The combination and conspiracy herein complained of has been in continuous existence since about December, 1963, and have been participated in varying periods and in varying degrees by each of the defendants herein named who, by virtue of controlling the special ships and tankers and freighters available, for the transportation of such products as L.P.G., V.C.M. and L.N.G. have obtained for themselves a worldwide monopoly of such type of transportation and that they entered into such conspiracy for the purpose of enabling the defendants SAGA and PETROMAR to breach agreements entered into between the said defendants and the plaintiffs for the transportation of the product known as V.C.M. and for the purpose of creating and fixing parallel prices and costs for the transportation of the said products.

and still is so engaged actively in the general business of export and import of commodities, including among other countries the United States of America, and its various possessions, and countries other than the United States of America, both in export and import

of the said commodities, and those activities are an integral and essential part of the business of the plaintiff, without which operations and activities the plaintiff's business would suffer economically.

- contracted to purchase 50,000 metric tons of Vinyl Chloride Monomer, commonly known in chemical parlance as V.C.M., and which will be hereinafter referred to as V.C.M., and take delivery of same from the Ethyl Corporation, at its plants for the production of such items both in Baton Rouge, Louisiana and Houston, Texas, and that in turn the plaintiff committed itself to the purchase and payment for the said 50,000 metric tons of V.C.M., and the plaintiff, in turn, made arrangements under firm contracts to sell the 50,000 metric tons of the said V.C.M. to its customers in France, Spain, Germany and in other countries in Europe under which firm contracts it was obligated to and was required to deliver the same to its said customers, and it was contemplated that the plaintiff would derive a profit therefrom.
- 13. That in order for the plaintiff to properly and effectively take delivery of the said 50,000 metric tons of V.C.M. over a period of time from the Ethyl Corporation as aforementioned, and in turn make delivery over a period of time of the said shipments of V.C.M. to the plaintiff's customers, as aforementioned,

it was essential and necessary that the plaintiff obtain the proper loading, transportation and unloading facilities therefor.

14. Accordingly, some time in the fall and the latter part of 1968, the plaintiff through its representatives made known to the defendants SAGA and to PETROMAR its said commitments both to the Ethyl Corporation and in turn to its customers, and the approximate times of acquisition of the V.C.M. and in turn its delivery spread over a period of time, and its various obligations to both the Ethyl Corporation and to the plaintiff's customers, all of which facts were made known to SAGA and its representatives, as well as the fact that a fixed item of cost for the loading, transportation, unloading and delivery of the material was necessary in order to assure the plaintiff of a profit in those transactions, and by virtue of the premises therefore, a contract was negotiated between the plaintiff, SAGA and PETROMAR for the shipping and transportation of the said material at \$23.00 per metric ton.

15. That the said defendants aforementioned, who control transportation of materials such as L.P.G. as aforementioned do in fact control the greatest percentage of the available tankers,

ships or freighters which are available for the transportation of the type of material handled by the plaintiff and in a manner which would insure complete and expeditious transportation of such materials to the plaintiff's customers, and the plaintiff has no other sources to obtain such tankers, ships or freighters to operate on a sound economic basis for the transportation of V.C.M. except through the instrumentality of the said defendants as aforementioned, and consequently, and as a result of this situation, the defendants have arrogated and obtained for themselves a worldwide monopoly of such type of transportation and therefore there were no effective means for the plaintiff to have operated on a sound economic basis except through the instrumentality and facilities of the said defendants, and all of which facts were and are fully known to the defendants and their representatives.

agreement with SAGA and PETROMAR for the transportation by SAGA and PETROMAR of 25,000 metric tons of the 50,000 metric tons of V.C.M. purchased by the plaintiff from Ethyl Corporation, plaintiff having many years of experience in the import-export field, and in the use of cargo ships, freighters and tankers, made many efforts to independently obtain the type of transportation which was specially required for the transportation of V.C.M. on an economical

basis, from various and sundry sources, but was unable to do so and to make any arrangements which would culminate in an agreement, except by and through the instrumentality and facilities of SAGA and PETROMAR.

portation of L.P.G., L.N.G., V.C.M. and other like products are such that they must be specially designed, fabricated and constructed in a manner to be uniquely and specially suited and adaptable for this type of transportation, andmeet with the special approval of the United States Coast Guard, for this type of transportation, and such type of tankers, and/or cargo ships or freighters are not available in any other way or through any other sources as aforestated, and those that might be available are not suitable for plaintiff's purposes.

18. That in addition to the foregoing, the defendants
SAGA and PETROMAR own and control the operations of important piers,
wharves and/or transportation facilities in Port Saint Louis Du
Rhone near Marseilles, France, so that when the tankers transporting
the V.C.M. arrive at the ports in France, the facilities, the piers,
the wharves, machinery, etc., required to unload and in turn thereafter properly to transport the materials to the various plants of
the plaintiff's customers, were owned or controlled by the said

defendant SAGA, and that, of course, in turn gave the defendant SAGA a greater hold upon the affairs of the plaintiff in properly and economically ultimately delivering the said V.C.M. to its customers in France.

- 19. That in or about the month of December 1968, the plaintiff and the defendants SAGA and PETROMAR entered into an agreement in Zurich, Switzerland, under the terms of which the plaintiff was given an irrevocable option by SAGA, under the terms of which the plaintiff would have the right to require SAGA to transport for and on behalf of the plaintiff, an additional 25,000 metric tons of V.C.M. from the ports in the states of Louisiana and Texas in the United States of America to ports in Europe, through the same medium of transportation and in the same manner and with the same facilities as prevailed with respect to the first 25,000 metric tons as aforementioned, for the same price of \$23.00 per metric ton, provided that the plaintiff would advise the defendant SAGA before July 1, 1969 that it intended to exercise such option and require SAGA to so transport the said additional 25,000 metric tons of V.C.M.
- 20. That in violation of the said agreement, SAGA pretending to carry out the terms of the said agreement, attempted to add a written confirmation which was prepared by it and the codefendant PETROMAR, which latter defendant in turn was under the

supervision, control and direction of SAGA, in which they attempted unilaterally to alter and/or change or modify the terms of the said agreement so negotiated between SAGA, PETROMAR and the plaintiff in December, 1968.

That the plaintiff made serious objections to the defendants SAGA and PETROMAR that this unilateral effort as aforementioned on their part was in direct violation of the terms of the agreement theretofore negotiated between the plaintiff and the defendants SAGA and PETROMAR, and the plaintiff rejected the attempt to so alter, modify or nullify the agreement originally negotiated in December, 1968, and the plaintiff notified the defendants SAGA and PETROMAR, both orally and in writing that it exercised its option under which it required the said defendants SAGA and PETROMAR to transport the additional 25,000 metric tons of V.C.M. commencing some time at the beginning of July 1969, and that plaintiff was ready and prepared to give the necessary schedule for the times, places of shipments, etc., but that the defendants SAGA and PETROMAR, without cause or justification, bluntly rejected the plaintiff's request and refused to adhere to and comply with their obligations under the terms of the said agreement negotiated in December, 1968, and refused to transport any of the said additional 25,000 metric tons as required of them under the terms of the agreement so negotiated in December of 1968 with the plaintiff.

- defendants SAGA and PETROMAR both orally and in writing that the breach of the said agreement of December, 1968 by the said defendants, in refusing to furnish the necessary transportation, loading and unloading facilities, including among other things the appropriate tankers, facilities, etc., in connection therewith, would resultingly cause the plaintiff considerable damage, since the plaintiff had no means of obtaining similar types of tankers and facilities from other sources, and since further, that the defendants SAGA and PETROMAR controlled the required type of tankers and the unloading facilities of the piers, wharves, railroad cars and other machinery and tackle in the port of Saint Louis Du Rhone near Marseilles, France, and all of which would result in very serious economic and substantial damage in turn to the plaintiff.
- 23. That the defendant SAGA without any justification or cause, deliberately and arbitrarily fixed a price of \$32.00 a metric ton as a condition for its going through with the agreement which it had already negotiated with the plaintiff in Zurich, in December, 1968 for \$23.00 a metric ton, and that all of the plaintiff's protestations, objections and arguments were of no avail.
- 24. Upon information and belief, that at all of the times hereinabove mentioned, one Mr. Bayle was the general manager

of the defendant, SAGA and that one Mr. Poudet was the general manager of the defendant, GAZOCEAN and in their respective capacities as such general managers, and with the authority of the defendants SAGA and GAZOCEAN, conducted secret talks and conversations with respect to a possible merger between the said two defendants, which said talks, conversations and conferences culminated in the attempt on the part of the defendants SAGA and PETROMAR to fix a new price of \$32.00 per metric ton instead of the \$23.00 per metric ton as previously agreed upon, all of which constituted a part of the conspiracy, scheme and plan on the part of the defendants to breach the agreement made in December, 1968 between plaintiff and the defendants, SAGA and PETROMAR.

- 25. That additionally the defendants, SAGA and PETROMAR by the unilateral action which they took as aforementioned in forwarding their fictitious version of a written confirmation of their understanding and agreement arrived at in December, 1968, made other important and substantial changes in the agreement originally arrived at, among which was a charge of \$20.00 per metric ton of dead weight, which of course were in contravention thereof, and not accepted by the plaintiff, and to all of which the plaintiff made known its objections and protests to the said defendants.
- ·26. When it became crystal clear that the defendants,

 SAGA and PETROMAR assisted by the defendant, GAZOCEAN were bent on

a program of causing economic harm and loss to the plaintiff in varying the terms of the agreement aforementioned with the plaintiff and deliberately increasing in a very substantial way the cost of said transportation, the plaintiff thereafter attempted to obtain, substitute and/or alternate transportation of the same type theretofore furnished by the defendants, SAGA and PETROMAR from the defendants MUNDO GAS and GAZOCEAN.

- 27. That in the month of March, 1969 the plaintiff began negotiations with the defendant, MUNDO GAS for the purpose of obtaining from the said defendant, MUNDO GAS ships and tankers and other means of transportation for the purpose of enabling the plaintiff to transport the 25,000 metric tons of V.C.M. from Port Allen to Marseilles at the rate of \$23.00 per metric ton.
- 28. That the said negotiations between the plaintiff and the defendant MUNDO GAS had reached the point where during the month of April, 1969 the plaintiff and the representatives of the defendant MUNDO GAS met in Zurich, Switzerland in April, 1969 and continued discussing the details of chartering the ships and tankers controlled by the defendant, MUNDO GAS and the said defendant, MUNDO GAS agreed.
- 29. Upon information and belief, that during the month of May, 1969, representatives and officials of the defendant MUNDO GAS and representatives of the defendant SAGA, met in the

city of London, England during the month of May, 1969 and conspired and agreed among them to raise the previous price of \$23.00 per metric ton offered by the defendant, MUNDO GAS to the plaintiff, to the sum of \$32.00 per metric ton and the defendant, MUNDO GAS thereupon advised the plaintiff that it would and did rescind the previous agreed offer of \$23.00 per metric ton and would not consider a price of less than \$32.00 per metric ton.

- 30. That it accordingly is clear that all of the defendants herein named thus joined in a conspiracy between them to fix a parallel or firm price of \$32.00 per metric ton for the transportation of the V.C.M. as aforementioned.
- 31. That accordingly, all of the efforts of the plain-tiff to obtain transportation from the defendants GAZOCEAN and MUNDO GAS were unsuccessful and fruitless, as a result of the conspiracy of the defendants.
- 32. Upon information and belief, by virtue of the great control and/or monopoly which the defendants SAGA, PETROMAR, MUNDO GAS AND GAZOCEAN in concert with the other defendants have in connection with the transportation of L.P.G., V.C.M. and other similar items, and the control either by themselves or through private charters with owners of the necessary tankers, cargo ships, freighters, etc., loading and unloading facilities, special and

unique tools, procedures, facilities, etc. for the transportation, loading and unloading of the said type of products, and because of their fixing of the price of \$32.00 per metric ton, which was economically ruinous to the plaintiff, since the plaintiff had made known to the defendants, SAGA, MUNDO GAS and PETROMAR that \$23.00 a metric ton cost for transportation was all it could economically bear as a burden, the plaintiff found itself in a very hapless and hopeless position of being unable to obtain the necessary tankers, equipment, facilities, etc. for the shipment of the said additional 25,000 metric tons of V.C.M., and has been damaged, and will continue to be damaged in the sum of approximately TWO MILLION (\$2,000,000) DOLLARS as a result of it being required to obtain substitute and alternative types of transportation as well as loading and unloading which will be very ruinous economically

FOR A SECOND COUNT

- 37. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "1" to "34" inclusive hereof with the same force and effect as if the same were fully set forth herein.
- the time when the plaintiff and the defendants, SAGA and PETROMAR entered into the agreement, hereinbefore set forth in paragraph "19" of this Complaint, the plaintiff disclosed to the said defendants the names of plaintiff's customers and the quantities of V.C.M. which the plaintiff had agreed and undertaken to sell and deliver to its customers both in the United States and abroad. That the said disclosures by the plaintiff to the said defendants were made in order to arrange for a schedule of shipments to be made by the said defendants in the tankers and ships owned and controlled by them, to the various customers of the plaintiff, all of the said disclosures being made in confidence and at the request of the said defendants, who agreed to keep the terms of the said contract strictly confidential.
- 39. That the plaintiff has not, either at the time of the said disclosures or at any other time authorized or consented to the disclosure or use of the said information by the said defendants to any person or for any purpose other than that of arranging a schedule of shipments to be made by the defendants in the ships and tankers owned by them.
- 40. That as part of the said agreement aforementioned, the said defendants agreed to make available to the plaintiff their technical people to resolve technical questions for unloading

to the plaintiff and will result in damages sustained by the plaintiff in the delivery of its aforementioned commodities to its customers to whom it is obligated to deliver the additional 25,000 metric tons of v.C.M.

- in concert, have been and are establishing parallel pricing of \$32.00 a metric ton for the transportation of V.C.M. and upon information and belief they have been and are cooperating, conspiring, collaborating and working together with each other in concert to uniformly fix conditions under which such transportation of such materials are effected, and establishing prices which they in turn regulate and control, and under threat of not affording transportation in the event their demands are not met by shippers, and restricting thereby both interstate and foreign commerce to the detriment of the plaintiff and others.
- 34. That the actions of the said defendants as forementioned are in direct violation of the provisions of Title 15
 U.S. Code, Section 1, et seq., and have directly affected adversely the economic interests of the plaintiff, and will continue to do so to the extent of damaging the plaintiff in the amount of TWO MILLION (\$2,000,000) DOLLARS.
- 35. That by virtue of the premises the plaintiff is entitled to treble damages in the aggregate of SIX MILLION (\$6, (\$6,000,000)DOLLARS, together with appropriate counsel fees and appropriate interest.
- 36. That the plaintiff demands a trial by jury of this action.

purposes both in the United States, in Europe and elsewhere in order to enable the parties to set up an exact schedule for the loadings and shipments of the 50,000 metric tons of V.C.M. which the said defendants agreed, in the December, 1968 Agreement, to make for and on behalf of the plaintiff.

- aforementioned, and as part of the conspiracy entered into between the defendants herein as more fully above stated, the defendant, SAGA refused to make available to the plaintiff its technical people to resolve technical questions for unloading purposes both in the United States, Europe and elsewhere and it categorically refused to give to the plaintiff an exact time table or schedule for the loadings of the first 25,000 of the 50,000 metric tons agreed upon in the said Agreement, as a result of which it became impossible for the plaintiff to furnish such a shipping schedule to its supplier the Ethyl Corporation. As a result of the said actions on the part of the defendants, the plaintiff was unable to furnish to the said Ethyl Corporation a shipping schedule to the plaintiff's detriment and damages.
- 42. Upon information and belief, plaintiff alleges that the said actions on the part of the defendants, SAGA and PETROMAR, in which the other defendants above named joined, was a part of the conspiracy on the part of the defendants to deprive the plaintiff of the benefits of its contracts with the various suppliers of the plaintiff and with plaintiff's customer's and for the purpose of the said defendants obtaining the benefits of such contracts.
- 43. Upon information and belief, plaintiff alleges that 24 a Mr. Le Floch, a representative of the defendant, SAGA, approached

the said Ethyl Corporation directly and offered to them the information previously communicated in confidence by the plaintiff to the said defendant SAGA at the time the agreement was arrived at, and informed the said Ethyl Corporation that the defendant SAGA, and not the plaintiff, was the only party with whom the said Ethyl Corporation should deal in the future.

- 44. Upon information and belief, that the said Le Floch, the New York representatives of the defendant SAGA, approached other suppliers of the plaintiff, to wit, Diamond Shamrock with a view of ascertaining whether the defendant SAGA could by-pass the plaintiff and get direct deliveries from the said Ethyl Corporation and Diamond Shamrock, which the said defendant could ship in its ships to plaintiff's customers in Europe. That in so doing, the defendant SAGA, in violation of the confidential information and instructions given to it by the plaintiff, as to where to deliver the said V.C.M. to customers in final destinations through the receiving terminal of the defendant SAGA in Port Saint Louis Du Rhone in southern France, thus converted and appropriated the plaintiff's contracts with its customers and derived profits therefrom.
- 45. Upon information and belief, that the defendants,
 SAGA and PETROMAR approached Pittsburgh Plate Glass Company in
 Pittsburgh, Pennsylvania and attempted to negotiate with the said
 Pittsburgh Plate Glass Company for direct deliveries from the said
 Pittsburgh Plate Glass Company to customers of the plaintiff in
 France, in behalf of the said defendants, all in violation of the
 confidential information obtained by the said defendants from
 plaintiff at the time when the said December, 1968 Agreement was

negotiated.

- 46. Upon information and belief, plaintiff alleges that the defendants, SAGA AND PETROMAR, originally offered to the plaintiff the low price of \$23.00 per metric ton for the first 25,000 metric tons of V.C.M. in order to obtain from the plaintiff the said confidential information of the names and locations of plaintiff's customers in order to enable the said defendants to do business directly with such customers without the intermediary of the plaintiff, all of which resulted in damage to the plaintiff.
- 47. Upon information and belief, that after the said defendants SAGA and PETROMAR, in violation of the agreement of December 1968, approached the plaintiff's suppliers and customers as above set forth and attempted to eliminate plaintiff from the said transactions aforementioned, and as part of the conspiracy entered into between the defendants, the defendants advised the plaintiff that the price which the plaintiff would have to pay for transporting the said product aforementioned, would be \$32.00 per metric ton and not \$23.00 per metric ton as previously agreed upon and that all of the defendants herein, entered into the said conspiracy, under which the said defendants agreed to fix and establish parallel prices of \$32.00 per metric ton for the transportation of the said V.C.M.
- 48. That all of the said actions on the part of the defendants constituted unfair methods, trade and competition on the part of the said defendants, in violation of the provisions of Title 15, U.S. Code, Sections "45" and "72" and that same have directly affected adversely the economic interests of the plaintiff and will continue to do so to the extent of damaging the plaintiff

in the amount of TWO MILLION (\$2,000,000) DOLLARS.

- . 49. That by the actions aforementioned, the defendants SAGA and PETROMAR in conjunction with the other defendants, wrongfully appropriated the information given to them in confidence by the plaintiff as above stated and appropriated it for their own purposes.
- 50. By the aforesaid acts, the defendants herein have been and continue to be unjustly enriched to the continuing damage and irreparable injury of the plaintiff, in the sum of TWO MILLION (\$2,000,000) DOLLARS.
- 51. That by virtue of the premises the plaintiff is entitled to treble damages in the aggregate sum of SIX MILLION (\$6,000,000) DOLLARS, together with the appropriate counsel fees and appropriate interest.
- 52. That the plaintiff demands a trial by jury of this action.

WHEREFORE, the plaintiff prays for damages in the sum of SIX MILLION (\$6,000,000) DOLLARS with appropriate interest thereon together with the appropriate attorneys fees together with the costs and disbursements of this action.

RAPHAEL, SEARLES & VISCHI Attorneys for Plaintiff

SIDNEY O. RAPHAEL
Member of the Firm
Office & P.O. Address
770 Lexington Avenue

New York, New York 10021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

-against-

SOCIETE ANONYME DE GERANCE
ET D'ARMEMENT, PETROMAR SOCIETE
ANONYME, MUNDO GAS, S.A., GAZOCEAN
INTERNATIONAL, S.A., GAZOCEAN
FRANCE, GAZOCEAN U.S.A., JOHN DOE
and RICHARD ROE, JOHN DOE CORPORATION and RICHARD ROE CORPORATION,
the names of the defendants, JOHN
DOE, RICHARD ROE, JOHN DOE CORPORATION and RICHARD ROE CORPORATION
being fictitious, their real names
and identities presently unknown
to the plaintiff,

69 Civ. 4223 (WK)

: ORDER TO SHOW CAUSE

Defendants.

Upon the annexed affidavit of Michael Winger, sworn to the 4th day of February, 1974, and all prior proceedings in this action, and good cause appearing therefor, it is hereby

ORDERED that plaintiff show cause before this

Court, at 2:00 p.M. on February 22, 1974, in Room 706,

United States Courthouse, Foley Square, New York, New York,

why an order should not be entered, pursuant to Rule 41(b),

Fed. R. Civ. P., dismissing the above-entitled action as to

defendant Petromar Societe Anonyme for failure to prosecute;

and it is further

ORDERED that the times within which defendant

Petromar Societe Anonyme may answer or move with respect to
the complaint herein, answer or object to the interrogatories
of plaintiff dated January 11, 1974, and respond to any other
discovery which has been or shall be initiated by plaintiff, 28

are hereby adjourned pending further order of this Court; and it is further

ORDERED that a copy of this Order and the annexed affidavit and memorandum submitted in support thereof be percent served upon Messrs. Burns, Van Kirk, Greene & Kafer, attorneys for plaintiff; Messrs. Haight, Gardner, Poor & Havins, attorneys for defendant Societe Anonyme de Gerance et D'Armement; Messrs. Donovan Leisure Newton & Irvine, attorneys for defendant Mundo Gas, S.A.; and Messrs. Fried, Frank, Harris, Shriver & Jacobson, attorneys for defendants Gazocean International, S.A., Gazocean France and Gazocean U.S.A., on or before 5:00 p.M. on February 5, 1974.

Dated: New York, New York February 4, 1974.

Whitman Knapp

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

-against- : 69 Civ. 4223

(WK)

AFFIDAVIT

SOCIETE ANONYME DE GERANCE ET

D'ARMEMENT, PETROMAR SOCIETE ANONYME,
MUNDO GAS, S.A., GAZOCEAN INTERNATIONAL,:
S.A., GAZOCEAN FRANCE, GAZOCEAN U.S.A.,
JOHN DOE and RICHARD ROE, JOHN DOE

CORPORATION and RICHARD ROE

CORPORATION, the names of the
defendants, JOHN DOE, RICHARD ROE,
JOHN DOE CORPORATION and RICHARD ROE

CORPORATION being fictitious, their
real names and identification
:

presently unknown to the plaintiff,

Defendants.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

MICHAEL WINGER, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York and before this Court. I am associated with the firm of Sullivan & Cromwell, counsel for defendant Petromar Societe Anonyme ("Petromar") in this action, and I submit this affidavit in support of the motion of Petromar to dismiss this action as to it for failure to prosecute. I also submit this affidavit in support of Petromar's application for an order adjourning, pending further order of this Court, the times for Petromar to answer or move with respect to the complaint herein, to answer or object to plaintiff's interrogatories dated January 11, 1974, and to respond to any other discovery initiated by plaintiff.

The Motion to Dismiss for Failure to Prosecute

- 2. The complaint herein was filed on September 25, 1969. The summons and complaint, however, were not served upon Petromar until December, 1973, more than four years after filing, when they were received by registered mail at Petromar's offices at 37 Rue Caumartin, Paris 9, France. A copy of the certificate of mailing the summons and complaint, showing the Rue Caumartin address, is attached hereto as Exhibit A.
- 3. I have inspected certain documents produced in this action by plaintiff to Messrs. Haight, Gardner, Poor & Havens, counsel for defendant Societe Anonyme de Gerance et D'Armement. These documents show that plaintiff communicated with Petromar at its Rue Caumartin address at least as early as February 3, 1969, seven months before filing the complaint herein.
- 4. Among these documents are copies of 26 separate letters sent by plaintiff to Petromar at 37 Rue Caumartin, Paris, France, between February 3, 1969, and July 14, 1969.

 I attach hereto as Exhibits B through F representative copies of such letters.
- 5. It is apparent from these documents that plaintiff has known since the commencement of this action where the summons and complaint herein could be served upon Petromar and willfully failed to obtain service. Accordingly, I respectfully submit that this complaint should be dismissed as to Petromar on the ground that plaintiff has failed to

prosecute this action for more than four years by willfully failing to obtain service of its complaint.

6. We bring on this motion by order to show cause since, as set forth below, Petromar's time to answer or move with respect to the complaint herein expires on February 6, 1974, and plaintiff's counsel has declined to stipulate to an extension of that time until after the preliminary question presented by this motion is decided.

The Application to Stay Petrol r's
Time to Respond to Complaint
Interrogatories and Other Discourty

- 7. Petromar's time to answer or move with respect to the complaint herein has been extended to February 6, 1974, by stipulation of counsel and order of this Court dated January 7, 1974. Petromar has been served by plaintiff with "Jurisdictional Interrogatories to Defendant Petromar Societe Anonyme" dated January 11, 1974.
- 8. Petromar is a French corporation which I am informed has no offices, agents or places of business within the United States. Accordingly, should its motion to dismiss for failure to prosecute be denied, Petromar will respond to the complaint by moving to dismiss this action as to it for lack of personal jurisdiction, improper venue, and insufficiency of service of process. Affidavits and memoranda must be prepared and submitted in support of this motion.
- 9. Plaintiff's interrogatories call for a great amount of detailed information, much of which is not relevant either to the merits of this action or to questions of jurisdiction, venue or service, and none of which is relevant to Petromar's motion to dismiss for failure to prosecute.

Preparing answers will be time-consuming and expensive, and making objections, should plaintiff elect to press its interrogatories, will consume the time both of counsel and of this Court.

- I am informed by counsel for Mundo Gas, S.A., which is also moving to dismiss this action for failure to prosecute, that they have asked plaintiff's counsel to stipulate to a stay of defendants' time to respond to the complaint, interrogatories and other discovery herein until the threshold question presented by the motions under Rule 41(b) has been resolved, and that plaintiffs' counsel decline to do so.
- 11. I respectfully submit that, while Petromar's motion to dismiss this action for failure to prosecute is pending, it would be pointless and wasteful to require Petromar to respond to either the complaint or plaintiff's discovery.

Sworn to before me this 4th day of February, 1974.

(Notary Public)

TARY PUBLIC, State of Maw (; Qualified in Nassau County Cert, filed in N:w York C. un in funires March ?

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

-against-

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, :
PETROMAR SOCIETE ANONYME, MUNDO GAS, S.A.,
GAZOCEAN INTERNATIONAL, S.A., GAZOCEAN FRANCE, :
GAZOCEAN U.S.A., JOHN DOE and RICHARD ROE,
JOHN DOE CORPORATION and RICHARD ROE CORPORATION,:
the names of the defendants, JOHN DOE, RICHARD
ROE, JOHN DOE CORPORATION and RICHARD ROE :
CORPORATION being fictitious, their real
names and identities presently unknown to the
plaintiff,

Defendants.

MEMORANDUM OF DEFENDANT PETROMAR SOCIETE ANONYME IN SUPPORT OF MOTION TO DISMISS THIS ACTION AS TO IT FOR FAILURE TO PROSECUTE

Defendant Petromar Societe Anonyme ("Petromar") submits this memorandum in support of its motion under Rule 41(b), Fed. R. Civ. P., to dismiss this action as to it for failure to prosecute. The ground for the motion is that for four years plaintiff willfully failed to obtain service of its complaint upon Petromar.

STATEMENT OF FACTS

The complaint in this action alleges violation of various sections of the United States antitrust laws* in connection with the transportation of vinyl chloride monomer.**

69 Civ. 4223

(WK)

^{*} Complaint, paragraphs 6, 8, 34, 48.

^{**} Complaint, paragraphs 9-33, 38-47.

It was filed on September 25, 1969, and, shortly thereafter, served upon two of the six named defendants.*

Petromar was not served until December, 1973
more than four years after the complaint was filed, although plaintiff was well aware of Petromar's business
address. Plaintiff had communicated with Petromar, at the
same address at which Petromar was ultimately served, at
least as early as February 3, 1969. (Affidavit of Michael
Winger, sworn to February 4, 1974 (hereinafter "Winger
Affidavit") pars. 3-4).

The proceedings between plaintiff, SAGA, and Gazocean U.S.A. during the four years between filing the complaint and service upon Petromar are listed on two-and-one-half pages of the docket of this Court; they include a decision by the United States Court of Appeals for the Second Circuit denying a motion by SAGA to dismiss this action for want of jurisdiction over the subject matter.**

The ground for that motion was that plaintiff is a Swiss corporation, SAGA is a French corporation, and a Swiss-French treaty requires all commercial actions between citizens of those two countries to be brought in the courts of

^{*} Society Anonyme de Gerance et D'Armement, hereinafter "SAGA", and Gazocean U.S.A., Inc., hereinafter "Gazocean U.S.A."

^{** 451} F.2d 727 (1971); cert. denied, 406 U.S. 906 (1972).

the nation of the person against whom the action is brought. Petromar is also a French corporation,* and had SAGA's motion been granted upon the ground asserted this action would necessarily have been dismissed as to Petromar as well.

ARGUMENT

Plaintiff's Failure to Serve Petromar Requires Dismissal of this Action

Rule 41(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

For failure of the plaintiff to prosecute ... a deferdant may move for dismissal of an action or of any claim against him.

Failure to serve a complaint is a failure to prosecute, and an unreasonable delay in service entitles a defendant -- whether or not he is prejudiced by the delay -- to dismissal under Rule 41(b). Messenger v. U.S., 231 F.2d 328 (C.A.2, 1956). In Messenger, the Court of Appeals for the Second Circuit declared:

Under Rule 41(b), a motion to dismiss may be granted for lack of reasonable diligence in prosecuting. [citations omitted] The operative condition of the Rule is lack of due diligence on the part of the plaintiff -- not a showing by the defendant that it will be prejudiced by denial of its motion. 231 F.2d at 331.

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^{*} Winger Affidavit, par. 8.

The Court of Appeals noted that a court might, in its discretion, and depending upon the degree of plaintiff's neglect, consider lack of prejudice in some cases. "But," it said, "under the circumstances of this case it would have been a gross abuse of discretion to make a finding of excusable neglect ..." Id.

Those circumstances were less compelling than
the circumstances herein. In Messenger, the plaintiff had
failed for over four years to serve his complaint against
the United States upon the Attorney General by registered
mail, as required by Rule 4(d)(4), Fed. R. Civ. P. However,
summons and complaint had been served upon the U.S.
Attorney for the Eastern District of New York, as Rule 4(d)(4)
also required, and the United States did not assert that it
was unaware that plaintiff sought to make it a party.

Here, in contrast, there was <u>no</u> service on Petromar for over four years. Evidently none was attempted, for plaintiff knew, well before filing his complaint, precisely where Petromar could be found. And here, as in Messenger,

... the defendant never served any notice of appearance or pleading and, although certain proceedings preliminary to trial were taken by the plaintiff and another defendant, who is not a party to this appeal, the appellee was not notified of nor did it participate in them. 231 F.2d at 329.

Since Messenger, other opinions have endorsed the rule that unreasonable delay in service, even without resulting prejudice, is grounds for dismissal. In Taub v. Hale, 355 F.2d 201 (1966), cert. denied 384 U.S. 1004 (1966), the Second Circuit upheld dismissal sua sponte of an action in which the complaint had not been served for over three years. "There was also a long and unnecessary delay in service which would, in itself, be adequate grounds for dismissal . . . absent factors which would afford justification or excuse," said the court. 355 F.2d at 201.

In Richardson v. U.S. Shipping Co., 38 F.R.D.

494 (N.D. Cal., 1965), a motion to dismiss was granted when service was delayed for over two years. Although it observed that "prejudice to the defendants is obvious," the court said, "The essential question, however, is whether there has been a failure to prosecute the action with reasonable diligence." 38 F.R.D. at 495. There was such a failure, the court held, for even though some methods of service had been attempted, others had not.

Plainly, plaintiff's neglect herein entitles

Petromar to dismissal of this action, as to it, for failure
to prosecute. The first step in the prosecution of a cause
of action, once filed, is service of the summons and complaint upon the defendant. A failure to make such service

is the most basic failure to prosecute. There can be no excuse for such a failure when a plaintiff who knows for four years how service could be made simply refuses to take the necessary steps.

This Court should also note that by the time plaintiff obtained service upon Petromar its cause of action was barred by the statute of limitations.* It would also have been too late to add Petromar as a defendant by amending the original complaint, if Petromar had not been named in it.** Only the presence of Petromar's name upon the original complaint allows plaintiff to assert that its claim can still be heard. But for four years plaintiff ignored the presence of that name, and it should not be permitted to rely upon that presence now.

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^{*} Plaintiff bases its action on various sections of the U.S. antitrust laws (Complaint, paragraphs 6, 8, 34, 48). Civil actions under these statutes must be commenced within four years of the injury complained of. 15 U.S.C. § 15-b. Since plaintiff's complaint was filed in September, 1969, by December, 1973, more than four years had passed since the occurrence of everything alleged in the complaint.

^{**} Rule 15(c), Fed. R. Civ. P., provides that an amendment changing the party against whom a claim is asserted relates back to the date of the original pleading only if, inter alia, "the party to be brought in ... knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him" (emphasis added). There has been no mistaken identity here. Accordingly, an amendment would not relate back and the four-year statute would have run.

Plaintiff's Failure to Serve Petromar Has Prejudiced Petromar.

Although an action may be dismissed for failure to prosecute whether or not the party seeking dismissal has been prejudiced by plaintiff's failure, prejudice supports dismissal. See, e.g., Howmet v. Tokyo Shipping Co., 318 F. Supp. 658 (D. Del., 1970); Richardson v. U. S. Shipping Co., supra. Here, plaintiff's neglect has prejudiced Petromar because Petromar was not present during formative stages of this litigation. This action has not been held in abeyance during the four years since it was filed. Plaintiff served two defendants almost immediately; they appeared, and have defended their position ever since. In particular, SAGA argued before this Court, and again before the Court of Appeals, a motion to dismiss based upon a treaty between France and Switzerland. The argument advanced by SAGA would have required dismissal of this action not only as to SAGA but as to Petromar -- like SAGA, a French corporation. Petromar had a right to be heard upon that motion,* and plaintiff's neglect has deprived it of that right.

^{*} In the first instance, and not merely upon such reargument as might now be allowed.

Moreover, in four years of litigation, defendants SAGA and Gazocean U.S.A. have no doubt made numerous tactical decisions about the conduct of this case. Had Petromar been a party some such decisions might have been made differently. If plaintiff intended to assert a common claim against Petromar and other persons, then Petromar had a right to participate in the preparation of a defense against that claim, to the extent that the defendants might choose to cooperate, from the very beginning. Plaintiff has denied Petromar that opportunity.

Even if there were no prejudice to Petromar, the addition of Petromar at this late stage imposes an unnecessary burden upon the other defendants and constitutes an unjustifiable imposition upon this Court. Service of the complaint upon Petromar places new jurisdictional issues before this Court which will undoubtedly delay for months proceedings on the merits of this action, which is already more than four years old.

Petromar is a French corporation. If unsuccessful on this motion, Petromar will move to dismiss the complaint on the ground that this Court has no personal jurisdiction

^{*} Petromar and its attorneys, as new arrivals in this case, cannot of course now say what tactical decisions were in fact made in the last four years.

over it, and that venue and service are improper as to it.

Plaintiff has already served "Jurisdictional Interrogatories to Defendant Petromar Societe Anonyme," dated January 11,

1974. The facts upon which such a jurisdictional motion would be decided are complex; a hearing might be required; a decision might not be made for months. Should this Court grant such a motion, as Petromar believes it would, plaintiff might elect to appeal, and a further delay would result.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that an order should be entered dismissing this action for failure to prosecute as to the defendant Petromar.

Respectfully submitted,

SULLIVAN & CROMWELL
Attorneys for Defendant
Petromar Societe Anonyme
48 Wall Street
New York, New York 10005

Of Counsel,

Richard E. Carlton Michael Winger UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

COPY RECEIVED Burns, Van Kirk, Greene & Laier

(W.K.)

ORDER

: TO SHOW CAUSE

-x FEB 5 13/4

JOSEPH MULLER CORPORATION ZURICH,

□ By Hand □ By Mall Postmarked.

Plaintiff,

- against -

: 69 Civ. 4223 SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, PETROMAR SOCIETE ANONYME, MUNDO GAS, S.A., GAZOCEAN INTERNATIONAL, S.A., GAZOCEAN FRANCE, GAZOCEAN U.S.A., JOHN DOE and RICHARD ROE, JOHN DOE CORPORATION and RICHARD ROE CORPORATION, the names of the defendants, JOHN DOE, RICHARD ROE CORPORATION being fictitious, their real names and identities presently unknown to plaintiff,

Defendants.

Upon the annexed affidavit of Peter B. Sobol, sworn to February 1, 1974, the pleadings and prior proceedings herein, and good cause appearing therefor, it is

ORDERED that plaintiff show cause before this Court, at a term for motions thereof, to be held in Room 120, United States Courthouse, Foley Square, New York, New York, at 2 p.m. on February 22, 1974, or as soon thereafter as counsel may be heard, why an order should not be entered, pursuant to Fed. R. Civ. P. 41(b), dismissing the aboveentitled action as to defendants Gazocean International, S.A., and Gazocean France for plaintiff's failure to prosecute; it is

FURTHER ORDERED that the time within which defendants Gazocean International, S.A., and Gazocean France may move or answer with respect to the complaint herein be, and

hereby is, extended until further order of this Court; it is

FURTHER ORDERED that the time within which defendants Gazocean International, S.A., and Gazocean France shall respond to any discovery that has been or shall be initiated by plaintiff herein be, and hereby is, likewise extended until further order of this Court; and it is

FURTHER ORDERED that a copy of this order and the annexed affidavit, together with the accompanying memorandum submitted in support thereof, be served respectively upon the attorneys for plaintiff and for defendants Societe Anonyme de Gerance et d'Armement, Petromar Societe Anonyme, and Mundo Gas, S.A., on or before from p.m., February 22, 1974.

Febraury / , 1974

J. S. D. J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff, :

-against-

SOCIETE ANONYME DE GERANCE ET
D'ARMEMENT, PETROMAR SOCIETE
ANONYME, MUNDO GAS, S.A., GAZOCEAN
INTERNATIONAL, S.A., GAZOCEAN FRANCE,
GAZOCEAN U.S.A., JOHN DOE and RICHARD
ROE, JOHN DOE CORPORATION and RICHARD
ROE CORPORATION, the names of the
defendants, JOHN DOE, RICHARD ROE,
JOHN DOE CORPORATION, and RICHARD ROE
CORPORATION being fictitious, their
real names and identities presently
unknown to the plaintiff.

69 Civ. 4223 (W.K.)

Defendants.

.___.

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

PETER B. SOBOL, being duly sworn, deposes and says:

- 1. I am an attorney associated with the firm of Fried, Frank, Harris, Shriver & Jacobson, attorneys for defendants Gazocean International, S.A., and Gazocean France. I am familiar with the facts and prior proceedings herein, and make this affidavit in support of the motion by those two defendants for an order dismissing this action as to them.
- 2. I have recently examined the papers filed with the Clerk of this Court in this case, as well as the Clerk's civil docket sheets. Together these clearly reveal that, when this action was filed, plaintiff expressly

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instructed the United States Marshal to serve only defendants Societe Anonyme de Gerance et d'Armement (SAGA) and Gazocean U.S.A., and then refrained from issuing any instructions to the Marshal until the recent service made by registered mail upon defendants Petromar Societe Anonyme, Mundo Gas, S.A., Gazocean International, and Gazocean France (collectively New Defendants).

- 3. Plaintiff filed its complaint on September 25, 1969, when it also issued summons and instruction for service upon the memorandum form then used by the office of the Marshal for the Southern District (copy annexed hereto as Exhibit A). Although the Marshal's memorandum form contains numbered lines sufficient for designation of service on as many as ten defendants, plaintiff chose to request service only upon SAGA and Gazocean U.S.A. Such service was completed, and the Marshal filed returns of service with respect thereto on October 23, 1969 (copies annexed hereto as Exhibit B).
- 4. Extensive correspondence between plaintiff and the headquarters of Gazocean France in early 1969 evidences plaintiff's familiarity with the address of the latter. In particular, two telexes exchanged between plaintiff and Gazocean France, dated respectively February 6 and 7, 1969 (copies annexed hereto as Exhibit C), demonstrate that plaintiff was given that address at that time. Moreover, I am informed by our clients that plaintiff's president, Joseph Muller, came in person to that address on or about February 14, 1969. The headquarters of Gazocean France remain at the same address today, which is where plaintiff caused the process styled "Additional Summons" to

be served on both Gazocean International and Gazocean France on December 26, 1973, more than four years subsequent to the filing of the complaint herein.

- 5. While entirely ignoring the New Defendants during those four years, in contrast, plaintiff, and particularly plaintiff's president, Joseph Muller, were most actively engaged before this Court, two appellate courts, and Magistrate Harold J. Raby with defendant SAGA: Mr. Muller submitted an "affirmation" sworn to March 23, 1970, in opposition to SAGA's motion to dismiss the companion contract action, 69 Civ. 4222; an affidavit sworn to March 16, 1973, in opposition to SAGA's motion for security for costs; a supplemental affidavit sworn to May 4, 1973, in opposition to the same motion; an affidavit sworn to November 20, 1973, in support of plaintiff's request for Court approval of its most recent substitution of counsel; and an affidavit sworn to November 29, 1973, in opposition to SAGA's Rule 37(d) motion. During this same period, plaintiff made a series of substitutions of successive counsel, all on the written consent of Mr. Muller: On April 3, 1973, plaintiff's initial attorneys of record, Messrs. Raphael, Searles, Vischi, Scher, Glover & D'Elia, were succeeded by Messrs. Eikenberry and Peterson; they, in turn, moved for an order permitting them to withdraw as plaintiff's attorneys of record and, on July 9, 1973, were succeeded by Messrs. Kirlin, Campbell & Keating; likewise the latter were succeeded on November 20, 1973 by plaintiff's present counsel of record, Messrs. Burns, Van Kirk, Greene & Kafer.
 - 6. Indeed, so active has plaintiff's president

been in supervising the conduct of this litigation that, after plaintiff's counsel had been informed on November 8, 1973, that counsel for defendants wished, pursuant to a previous general understanding, to postpone the deposition of plaintiff's president then scheduled for November 13, 1973, he personally flew from Zurich to New York, at which time, according to his then counsel, he instructed them to move by order to show cause why SAGA should not be directed to take his deposition on that date.

7. Plaintiff has demonstrated a complete lack of diligence in prosecuting this action as against defendants Gazocean International and Gazocean France by its failure for more than four years to serve process upon those two defendants, although it was at all times able to do so. For its dilatory conduct it has offered no excuse; nor can it offer any. Plaintiff and its president meanwhile have remained close to and active in this litigation in other respects, which have already taken up much time of the two defendants originally served and of this and other courts. For the foregoing reasons, I respectfully request that this action be dismissed as against defendants Gazocean International and Gazocean France.

Peter B. Sobol

Sworn to before me February 4, 1974.

" aulyn & Boldman

MARILYN N. GOLDMAN Notary Public. State of New York No. 24-6571855

Qualified in Kings County
Corrected filed in New York County

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK JOSEPH MULLER CORPORATION ZURICH, Plaintiff, - against -SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, PETROMAR SOCIETE ANONYME, MUNDO GAS, S.A., GAZOCEAN INTERNATIONAL, S.A., GAZOCEAN FRANCE, 69 Civ. 4223 (W.K.) GAZOCEAN U.S.A., JOHN DOE and RICHARD ROE, JOHN DOE CORPORATION and RICHARD ROE CORPORATION, the names of the defendants, JOHN DOE, RICHARD ROE, JOHN DOE CORPORATION, and RICHARD ROE CORPORATION being fictitious, their real names and identities presently unknown to the plaintiff, Defendants.

MEMORANDUM OF GAZOCEAN INTERNATIONAL AND GAZOCEAN FRANCE IN SUPPORT OF THEIR MOTION TO DISMISS THIS ACTION AS TO THEM FOR PLAINTIFF'S FAILURE TO PROSECUTE

Defendants Gazocean International, S.A., and
Gazocean France move to dismiss the action as to them for
plaintiff's failure to prosecute. These two defendants make
their motion concurrently with the motions of defendants
Petromar Societe Anonyme and Mundo Gas (conjointly, New
Defendants), by order to show cause, under Rule 41(b) of

the Federal Rules of Civil Procedure, on the grounds of plaintiff's inexcusable failure to prosecute its claims against them until more than four years subsequent to the filing of the complaint, and after the running of the relevant statute of limitations.

Nature of the Action

Plaintiff filed its Complaint September 25, 1969; and only on December 26, 1973, did it effect on Gazocean International and Gazocean France service of process styled "Additional Summons", made by registered mail. The complaint alleges, inter alia, that the six named defendants specifically identified in the caption engaged, in violation of the United States antitrust laws, in a conspiracy to fix transportation rates of vinyl chloride monomer in late 1968 and early 1969.

Upon filing its complaint, plaintiff apparently gave instructions to the United States Marshal to serve only two of the defendants named therein, Societe Anonyme de Gerance et d'Armement (SAGA) and Gazocean U.S.A.

(Affidavit of Peter B. Sobol, ¶ 3 & Ex. A.) Such service was completed and return of service filed in October 1969.

(Sobol Aff. ¶ 3 & Ex. B.) Plaintiff made no attempt, however, to serve process upon either Gazocean International or Gazocean France until over four years later. This is

true, notwithstanding that plaintiff well knew the address of the headquarters of Gazocean France in Paris -- an address which has remained unchanged since plaintiff's correspondence directed there and the visit there of plaintiff's president, Joseph Muller, in 1969, to the present time, when, a little over a month ago, plaintiff caused its process on both Gazocean International and Gazocean France to be served there. (Sobol Aff. ¶ 4 & Ex. C.)

The proceedings herein subsequent to the filing of the complaint, involving plaintiff, SAGA, and Gazocean U.S.A., occupy three single-spaced pages of the civil docket sheet maintained by the Clerk of this Court. These include, besides an order requiring plaintiff to post security for costs and the setting and supervision of a discovery schedule, a decision by the United States Court of Appeals for the Second Circuit denying a motion by SAGA to dismiss this action for want of jurisdiction over the subject matter and reversing the denial of a motion by SAGA to dismiss a companion action brought by plaintiff within the diversity jurisdiction of this Court, grounded on allegations of breach of contract. Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement, 451 F.2d 727 (1971), cert. denied, 406 U.S. 906 (1972), aff'g in part and rev'g in part 314 F. Supp. 439 (S.D.N.Y. 1970). The basis for SAGA's motion was that plaintiff is a Swiss corporation, SAGA a French corporation, and a treaty between Switzerland and France requires all commercial actions between citizens of those countries to be brought in the courts of the nation of the party defendant. Gazocean International is a Swiss corporation; Gazocean France, a French corporation; certainly the participation of each of those defendants, had they been served by December 1969, when those motions were made, would have been appropriate.

Argument

PLAINTIFF'S UNEXCUSED AND INEXCUSABLE FAILURE
TO PROSECUTE ITS ACTION AGAINST GAZOCEAN INTERNATIONAL
AND GAZOCEAN FRANCE UNTIL MORE THAN FOUR YEARS AFTER
FILING ITS COMPLAINT REQUIRES DISMISSAL OF THIS ACTION
AS AGAINST THOSE TWO DEFENDANTS.

Rule 41(b) of the Federal Rules of Civil Procedure provides, in pertinent part: "For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim against him." It has been clearly established that failure to serve a complaint constitutes failure to prosecute under Rule 41(b), as has consistently been held both by the Second Circuit, e.g., Taub v. Hale, 355 F.2d 201, cert. denied, 384 U.S. 1007 (1966), and elsewhere, e.g., Durst v. National Casualty Co., 452 F.2d 610

(9th Cir.), cert. denied, 409 U.S. 967 (1972). Dismissal in such circumstances has been affirmed even by an appellate court "fully mindful that appellant's claim might ultimately have had some substantial merit." Spering v. Texas Butadiene & Chemical Corp., 434 F.2d 677 (3d Cir. 1970), cert. denied, 404 U.S. 854 (1971).

Furthermore, to justify dismissal under the Rule, it is "not necessary for the Court to find that there was a specific impairment of [defendants'] defenses, because the law presumes injury from unreasonable delay." States

Steamship Co. v. Philippine Air Lines, 426 F.2d 803 (9th Cir. 1970) (emphasis supplied); accord, e.g., S & K Airport Drive-In, Inc. v. Paramount Film Distributing Corp., 58

F.R.D. 4, 8 (E.D. Pa. 1973). As Judge Medina has likewise specified, writing for the Second Circuit:

"... The operative condition of the Rule is lack of due diligence on the part of the plaintiff -- not a showing by the defendant that it will be prejudiced by denial of its motion." Messenger v. United States, 231 F.2d 328, 331 (1956).

An indication of the attitude of the Southern District toward stale claims is afforded by its General Rule 23(a), which provides that the Court upon a calendar call may enter an order dismissing for want of prosecution any civil cause which has been pending for more than one year and is not on the trial calendar.

Not only has plaintiff not been diligent in

prosecuting its claim against the New Defendants, but it cannot excuse its dilatory conduct. During its fouryear delay in serving Gazocean International and Gazocean France, as in serving the other two moving defendants, plaintiff has always known that each of those named parties were at all times amenable to process. Such a record presents what the Second Circuit (discussing a failure to serve 1-1/2 years after filing the complaint) has termed "a long and unnecessary delay in service which would, in itself, be adequate grounds for dismissal . . . absent factors which would afford justification or excuse." Taub v. Hale, 355 F.2d at 202 (emphasis supplied) (citations omitted). Plaintiff's action in this case is neither excused nor excusable; its delay is long in the extreme; the action required of it to effectuate service was merely that of supplying the Marshal with the addresses of the New Defendants, to which the Clerk of the Court need merely have sent copies of the summons and complaint by registered mail, return receipt requested (as it was eventually requested by plaintiff to do).

Moreover, several aspects of plaintiff's conduct here affirmatively compel dismissal under Rule 41(b). In the first place, far from neglecting its lawsuit generally, plaintiff actively engaged defendant SAGA in litigation involving this Court, two appellate courts, and a magistrate

during the four years since the complaint was filed. In these circumstances, the discussion of the Ninth Circuit respecting a similar record is particularly apt:

"... Delay is almost always prejudicial to one side or the other. It tends also to result in an inordinate use of the Court's time to the prejudice of other litigants. The probability of prejudice to defendants upon whom process is not served for a long time is particularly great... The longer the delay, the more likely prejudice becomes." Pearson v. Dennison, 353 F.2d 24, 28 (1965).

Secondly, extenuating circumstances are here clearly absent. The Supreme Court and other courts have occasionally been at pains in affirming otherwise appropriate dismissals of a plaintiff's claim due to the inexcusable delay of the plaintiff's attorney in prosecuting. See, e.g., Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962); Spering v. Texas Butadiene & Chemical Corp., 434 F.2d at 680. Here, however, plaintiff's president has been pervasive in supervising the conduct of this litigation, as is evidenced through his many affidavits, his flight to New York in an attempt to force SAGA to take his deposition when he wanted, and plaintiff's substitutions of four successive legal representatives. (Sobol Aff. 14 5 & 6.) As was stated by a district judge recently reviewing an apposite situation,

"[T]his is not the ordinary case where an unfortunate plaintiff is held accountable for the lethargic lawyer. Here the man in charge of this litigation is the house counsel and a director of the plaintiff corporation. . . The record is replete with references to

communication problems which the local counsel had with [the house counsel] throughout the course of this litigation." U.S.N. Co. v. American Express Co., 55 F.R.D. 31, 37 (E.D. Pa. 1972).

Rule 41(b), "this is not a case where a blameless client is paying a harsh penalty for his lawyer's shortcomings."

Redac Project 6426, Inc. v. Allstate Insurance Co., 412

F. 2d 1043, 1047 (2d Cir. 1969).

Finally, serious and material prejudice will in fact be suffered by Gazocean International and Gazocean France if plaintiff is able to render effective its tardy service on them. Not only have they not been closely involved in the progress of this action, but, prior to the service made upon them, the relevant statute of limitations with respect to plaintiff's allegations had already run. Any civil action under the antitrust laws of the United States "shall be forever barred unless commenced within four years after the cause of action is accrued." Clayton Act § 4B, 15 U.S.C. § 15b (1970). Such an accrual occurs in law simultaneously with the alleged injury to plaintiff, which is itself:

". . . an act or occurrence which impairs the economic position of the plaintiff. If the loss of future profits or some other monetary loss is rendered inevitable by such an act or occurrence, the wrong is complete, and the statutory period of limitations against the suit then commences to run." Emich Motor Corp.
v. General Motors Corp., [1955] Trade Cas. ¶ 67,960,

at 70,135 (N.D. III. 1955), aff'd, 229 F.2d 714 (7th Cir. 1956); accord, Charles Rubenstein, Inc. v. Columbia Pictures Corp., 154 F. Supp. 216, 219 (D.C. Minn. 1957) ("The statute of limitations . . . begins from the date when an overt act of the conspirators produces damages. A continuing conspiracy as such is not actionable."); Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190, 195 (9th Cir. 1956) ("In a continuing conspiracy causing continuing damage without further overt acts, the statute of limitations runs, as we have noted, from the time the blow which caused the damage was struck.").

Plaintiff's tardy service more than four years after filing its complaint is ineffective to toll the statute of limitations. So the Second Circuit has held, in accordance with the weight of authority elsewhere. Judge Medina cites with apparent approval cases which

"... held that after the filing of the complaint, the action remains pending in an inchoate state until service is completed unless and until the action is dismissed for failure to prosecute under Rule 41(b)." Messenger v. United States, 231 F.2d at 329.

The Second Circuit decision goes on to hold that service in that case was never accomplished and hence a nullity. Therefore, in light of the five years which had elapsed between the filing of the complaint and the defendant's motion to dismiss, Judge Medina observed, "clearly the court below was warranted in dismissing for failure to prosecute under Rule 41(b)." 231 F.2d at 330. More recently, Judge (then Chief Judge) Lumbard made the following pertinent observation:

filing requirements of the federal rules, the plaintiff is under the duty, in view of Rule 4(a), Fed. R. Civ. P., to use due diligence

in securing the issuance and service of the summons." Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 606 (2d Cir. 1968).

An earlier and often cited District Court case, upon which Judge Lumbard relied in his opinion, is more specific:

"It appears to be fairly well settled that Rules 3 and 4, F.R.C.P. must be construed together, and that the filing of a complaint, when followed by lodging of the summons or writ in the Marshal's office, will toll the statute of limitations."

Hukill v. Pacific & Arctic R.R. & Navigation Co., 159 F. Supp. 571, 573-74 (D. Ala. 1958) (emphasis supplied).

In that case, plaintiff brought an action under the Federal Employers' Liability Act, which was governed by a two-year statute of limitations. He filed a complaint, but did not deliver a summons to the Marshal or other process server until over a year later, after the statute had run. In that posture, the Second Circuit held, "It therefore conclusively appears that the action was not timely commenced, within the meaning of the above Rules." Similarly, Chief Judge Edelstein has held for this Court:

"It is well established that to commence a civil action in the Federal court the plaintiff must comply with Rules 3 and 4 Fed. R. Civ. P. Rules 3 and 4 are to be read together and the authorities have reiterated that an action is not commenced until the complaint is filed and the summons is issued and forthwith delivered to the Marshal so that service may be made upon the defendant." Application of Royal Bank of Canada, 33 F.R.D. 296, 299 (1963) (emphasis in Original). Accord, 2 J.W. Moore, Federal Practice 1 3.07[4.-3-2], at 785 (1970).

Of course, if the statute of limitations were tolled by

the filing of plaintiff's complaint, without more, then the New Defendants would be prejudiced for all the reasons that stale claims are time-barred by such statutes.

Conclusion

For the foregoing reasons, the motion by defendants Gazocean International and Gazocean France for an order of this Court dismissing this action as to them should be granted.

February 4, 1974

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
Attorneys for Defendants
Gazocean International, S.A.,
and Gazocean France
120 Broadway
New York, New York 10005
(212) 964-6500

VICTOR S. FRIEDMAN, PETER B. SOBOL,

Of Counsel.

COPY RECEIVED Curns, Van Kirk, Greeno & Kafer

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

-against-

FEB 5 1974

JOSEPH MULLER CORPORATION ZURICH,

. By Hand By Mall Pestmarked....

Plaintiff,

69 Civ. 4223 WK

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, PETROMAR SOCIETE ANONYME, MUNDO GAS, S.A., GAZOCEAN

ORDER TO SHOW CAUSE

INTERNATIONAL, S.A., GAZOCEAN FRANCE, : GAZOCEAN U.S.A., JOHN DOE and RICHARD ROE, JOHN DOE CORPORATION and RICHARD : ROE CORPORATION, the names of the defendants, JOHN DOE, RICHARD ROE, JOHN DOE CORPORATION and RICHARD ROE CORPORATION being fictitious, their real names and identities presently unknown to the plaintiff,

Defendants.

Upon the annexed affidavit of Sanford M. Litvack, Esq., sworn to the 4th day of February 1974, the Memorandum of Law, and upon the complaint and all prior proceedings herein, it is ORDERED that plaintiff show cause before me on the 2200 8th day of February, 1974 at 2:00 o'clock in the afternoon, in

Room 128 of the United States Court House, Foley Square, New York, New York, why an order should not be entered herein dismissing the complaint against defendant Mundo Gas, S.A. ("Mundo")

pursuant to Rule 41(b), Fed.R.Civ.P., for failure to prosecute.

IT IS FURTHER ORDERED that the time for defendant Mundo to answer or move in regard to the complaint herein or to respond to any discovery that has been or shall be initiated by plaintiff be, and the same hereby is, stayed pending further order of the Court.

IT IS FURTHER ORDERED that service of this Order and the papers upon which is granted upon plaintiff's counsel by 5:00 o'clock in the afternoon on February 4, 1974, shall be good and sufficient service.

Whitman Traffe

Dated: New York, New York February 4, 1974 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

- against -

69 Civ. 4223

SOCIETE ANONYME DE GERANCE .

ET D'ARMEMENT, PETROMAR SOCIETE
ANONYME, MUNDO GAS, S.A., GAZOCEAN
INTERNATIONAL, S.A., GAZOCEAN FRANCE,
GAZOCEAN U.S.A., JOHN DOE and RICHARD
ROE, JOHN DOE CORPORATION and RICHARD
ROE CORPORATION, the names of the defendants JOHN DOE, RICHARD ROE, JOHN
DOE CORPORATION and RICHARD ROE
CORPORATION being fictitious, their
real names and identities presently
unknown to the plaintiff,

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Defendants.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

SANFORD M. LITVACK, being duly sworn, deposes and says:

- 1. I am a member of the Bar of this Court and a member of the law firm of Donovan Leisure Newton & Irvine, 30 Rockefeller Plaza, New York, New York 10020, attorneys for Mundo Gas, S.A. ("Mundo") a named defendant in the above-captioned action.
- 2. The complaint in this action, which was filed on September 25, 1969, alleges, inter alia, violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 and Sections 3 and 7 of the Clayton Act, 15 U.S.C. §§ 14, 17. Briefly, the plaintiff alleged that defendants had a worldwide monopoly over certain types of 62

transportation, that they conspired to fix transportation costs for certain products between various European ports and various United States ports. A copy of the Complaint is annexed as Exhibit A.

- 3. Although the complaint was filed in September of 1969, and certain defendants were served at that time, no attempt was made to serve Mundo until December of 1973. On December 24, 1973, Mundo, a Panamanian corporation, with its offices in Hamilton, Bermuda, received, by mail, an "additional summons" and copy of the complaint, at its office in Hamilton. Then, on January 8, 1974, a copy of the summons and complaint were personally handed to Mr. Charles T. Collis, Secretary of Mundo, in Hamilton, by a Mr. David Wilkinson, a member of the firm of Cox & Wilkinson, Hamilton, Bermuda. A copy of said summons is annexed as Exhibit B.
- 4. On January 8, 1974, it was agreed that defendant Mundo's time to answer or move with respect to the complaint be extended to February 6, 1974. A copy of the stipulation extending Mundo's time to answer or move in regard to the complaint is annexed hereto as Exhibit C.
- 5. At the time the stipulation was entered into, I advised plaintiff's counsel that we intended to move, as promptly as possible, to dismiss this case against Mundo pursuant to Rule 41(b), Fed.R.Civ.P., in view of plaintiff's total failure to attempt to serve Mundo and its failure to prosecute against this defendant. I explained that since success on that motion would obviate the need for any further action on Mundo's part,

we intended to request a stay of Mundo's time to answer or move as well as the time to respond to any discovery plaintiff might initiate concerning jurisdiction until after a ruling upon our Rule 41(b) motion. I also informed plaintiff's counsel that should the motion to dismiss for lack of prosecution not be granted, we would then move to dismiss under Rule 12, Fed.R.Civ. P., on various grounds but most importantly the lack of in personam jurisdiction, improper venue, and invalid service of process. A copy of my letter to counsel is annexed as Exhibit D.

- the filing of the complaint and any attempt to effectuate service, defendant Mundo is now moving to dismiss under Rule 41(b) for lack of prosecution. In Idition, Mundo is requesting an order delaying its time to respond to the complaint or other discovery pending further order of the Court. Since Mundo is now required to answer or move with respect to the complaint by February 6 and to the interrogatories by February 13, I requested that plaintiff's counsel adjourn these dates until after a ruling on the Rule 41(b) motion. In light of the nature of this motion, plaintiff's counsel felt he could not agree to the requested adjournment.
- 7. In view of the foregoing, Mundo is bringing on this motion by an Order to Show Cause to avoid the necessity of burdening the Court with additional motions directed to the complaint or to discovery matters which may not be required.

8. No previous application for the relief herein prayed for has been made.

Sanford M. Litvack

Sworn to before me this
4th day of February, 1974.

Notary Public J

ANITA FUDGE

Notary Public. State of New York

No. 1341925 Qualified in Queens County

Cert. Filed in New York County

Commission Expires March 30, 19

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

-against
SOCIETE ANONYME DE GERANCE ET
D'ARMEMENT, PETROMAR SOCIETE
ANONYME, MUNDO GAS, S.A., GAZOCEAN
INTERNATIONAL, S.A. GAZOCEAN FRANCE,
GAZOCEAN U.S.A., JOHN DOE and RICHARD
ROE, JOHN DOE CORPORATION and RICHARD
ROE CORPORATION, the names of the defendants, JOHN DOE, RICHARD ROE, JOHN
DOE CORPORATION and RICHARD ROE
:

CORPORATION being fictitious, their real names and identities presently

unknown to the plaintiff,

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MUNDO GAS, S.A.'S MOTION TO DISMISS

Defendants.

This Memorandum is submitted on behalf of defendant Mundo Gas, S.A. ("Mundo") in support of its motion to dismiss the complaint as to this defendant, pursuant to Rule 41(b) Fed.R.Civ.P., in light of plaintiff's total failure to effectuate service and prosecute this action against Mundo.

Background

The complaint in this suit, which was filed on September 25, 1969, charges inter alia, that the defendants, including Mundo, entered into a worldwide conspiracy in violation of Section 1 of the Sherman Act. According to the complaint, defendants conspired to fix transportation costs for certain products between various European ports and various United States ports. (Affidavit of Sanford M. Litvack, hereinafter "Litvack Aff.," par. 2).

After filing the complaint, plaintiff apparently decided to serve two of the defendants, Societe Anonyme de Gerance Et D'Armement ("SAGA") and Gazocean U.S.A., and proceeded with the case against them. This was done in October of 1969. However, no service of process was attempted with respect to Mundo, a Panamanian corporation, with its offices in Hamilton, Bermuda (Litvack Aff., par. 3).

On or about December 18, 1973, more than four years after the filing of the complaint, plaintiff decided it would try to drag Mundo into this case by mailing an "additional summons" and a copy of the four year old complaint to Mundo at its offices in Hamilton, Bermuda. Since it was apparently not satisfied that even this

belated service was valid, almost a month later, on January 8, 1974, plaintiff had a copy of the additional summons and complaint personally handed to Mundo's Secretary in Hamilton, Bermuda (Litvack Aff., par. 3).

After Mundo received the "additional summons," counsel contacted the attorneys for plaintiff and advised them that Mundo intended to move as promptly as possible to dismiss the complaint for failure to prosecute under Rule 41(b), since success on that motion would obviate the need for any further action on Mundo's part. Plaintiff's counsel was also informed that should the motion to dismiss for lack of prosecution not be granted, Mundo would move to dismiss under Rule 12, Fed.R.Civ.P., on various grounds including lack of in personam jurisdiction, improper venue and invalid service of process (Litvack Aff., par. 5).

In view of the extensive and unusual delay in attempting to effectuate service, Mundo, on February 4, 1974, filed the instant motion to dismiss it as a defendant herein. Since we believe that this motion is and should be dispositive of the matter as to Mundo, defendant has also requested that its time to move or answer the complaint herein and to respond to plaintiff's interrogatories be stayed so that

defendant and the Court need not be burdened with further unnecessary matters.

would bring to the Court's attention, by motion, the lack of in personam jurisdiction and improper venue with respect to Mundo. Mundo would also respond at that time to any proper discovery concerning the jurisdictional issue.

However, all that may never be necessary if, as we submit it should be, the complaint is dismissed as to this defendant for lack of prosecution under Rule 41(b).

ARGUMENT

THE COMPLAINT AGAINST MUNDO SHOULD BE DISMISSED UNDER RULE 41(b)

A. Rule 41(b) requires dismissal where there has been a lack of diligence in attempting to serve a defendant.

The federal courts, and particularly the courts in this circuit, have consistently held that the failure of a plaintiff to effectuate service upon a named defendant for a lengthy period of time is a "failure to prosecute" within the meaning of Rule 41(b), Fed.R.Civ.P.* E.g.,

Taub v. Hale, 355 F.2d 201 (2d Cir.), cert. denied, 384

U.S. 1007 (1966); Pearson v. Dennison, 353 F.2d 24 (9th Cir. 1965); Messenger v. United States, 231 F.2d 328 (2d Cir. 1956); Campbell v. Plavchak, 21 F.R.D. 41 (E.D.Pa. 1957).**

As was recently concluded by a federal district court in Howmet Corporation v. Tokyo Shipping Co., 318 F.

Supp. 658, 661 (D. Del. 1970):

Rule 41(b), Fed.R.Civ.P., reads, in pertinent part, as follows:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

^{**} Indeed, the court can do so sua sponte in its discretion. Taub v. Hale, supra.

Thus, failure to make service of process within a reasonable time as contemplated by Rule 4, F.R. Civ. P., may amount to want of prosecution [citations omitted]. "Failure to use reasonable diligence in serving a summons is more fraught with possibilities of unfairness and abuse than failure to diligently prosecute an action after summons is served. For, in the latter case, a defendant has at least a timely opportunity to investigate the claim and prepare its defense." Richardson v. United White Shipping Co., 38 F.R.D. 494, 495-496 (N.D. Cal. 1965).

B. The facts of this case clearly warrant a Rule 41(b) dismissal.

picture for a Rule 41(b) dismissal. First, more than four years have elapsed between the filing of the complaint and any attempt to serve Mundo. While the Court of Appeals has noted that all that is required for dismissal is a "...lack of due diligence on the part of plaintiff ..." in completing service, Messenger v. United States, supra at 331, here there has been a gross and deliberate failure by plaintiff to bring Mundo into this case. This is more than sufficient to warrant dismissal under the Rule. See Taub v. Hale, supra (17 months delay); Pearson v. Dennison, supra (15 months to two years); Hownet Corporation v. Tokyo Shipping Co., supra (3 years, 3 months); Campbell v. Plavchak, supra (20 months).

Moreover, the four-year delay is completely inexcusable. While plaintiff noted in its complaint, filed in 1969, that Mundo has an office in Hamilton, Bermuda, it took no steps whatsoever to even attempt service until now. The route it followed in 1973, i.e., simply mailing the papers to Mundo in Hamilton, Bermuda, was open to plaintiff at any time during that four-year period.* Consequently, plaintiff's omission can have no acceptable justification. Plaintiff has exhibited far more than a lack of "due diligence;" it made a conscious decision not to serve Mundo, which it cannot reverse four years later. See Messenger v. United States, supra; Campbell v. Playchak, supra.

Indeed, but for its present belated effort to pull Mundo into this lawsuit, plaintiff would face a statute of limitations bar.** 15 U.S.C. § 15B. Thus, it would be particularly inequitable to allow plaintiff's stratagem to succeed, because to do so is, in effect, to extend the statute of limitations, which has long since expired. See Dewey v. Farchone, 460 F.2d 1338 (7th Cir. 1972). Plaintiff should not be permitted to circumvent the

Defendant does not admit that service was valid and intends to challenge jurisdiction over the person of defendant Mundo and validity of service if this motion should fail. However, for purposes of this motion only, defendant assumes arguendo that service was valid and argues that even if so, plaintiff's delay in service bars this lawsuit.

Most of the acts attributed to defendants in the complaint occurred in or about December 1968. In any event, no act is alleged to have occurred past May 1969. The complaint asserts jurisdiction by virtue of the antitrust laws, which provide a four-year statute of limitations. 15 U.S.C. § 15B.

statute of limitations bar in this manner.*

It also should be noted that if this Court were to require Mundo to remain in this lawsuit, the existing parties, the progress of the suit, and hence the orderly administration of justice, would be adversely affected. As previously noted, Mundo has already informed plaintiff's counsel that if the instant motion were denied, it will move to dismiss the complaint, pursuant to Rule 12, Fed. R. Civ. P., for lack of in personam jurisdiction, improper venue and invalid service of process (Litvack Aff., par. 5). Obviously such a motion would, of necessity, involve considerable effort and time for the Court and all parties. If the motion were granted, as we believe it would be, plaintiff may seek review of such a ruling. This is particularly likely here, since but for Mundo's inclusion in this lawsuit, plaintiff has no separate remedy against Mundo because the statute of limitations has run. See p. 7, supra.

Apart from a decision on the Rule 12 motion itself, the discovery procedures that will involve these added defendants will considerably delay the progress of this suit.

^{*} In fact, some courts have held that a staute of limitations is not tolled if the complaint is filed but service is not effectuated. E.g., Hukill v. Pacific & Arctic Railway and Navigation Co., 159 F. Supp. 571 (D. Alaska 1958); see also Mohler v. Miller, 235 F.2d 153 (6th Cir. 1956); Application of Royal Bank of Canada, 33 F.R.D. 296 (S.D.N.Y. 1963).

Plaintiff has served jurisdictional interrogatories on Mundo, which undoubtedly must be resolved before there can be any discovery by plaintiff on the merits. Furthermore, Mundo and the other defendants that plaintiff has now sought to add to this lawsuit have each written to Magistrate Raby to advise him that it is their position that they are not bound by any discovery on the merits which has previously taken place or which is held in the interim before resolution of their Rule 41(b) motions and any Rule 12 motions they may make, and that it would be inherently unfair to them if such discovery were binding upon them. Thus, Mundo's late inclusion will cause duplication of the discovery efforts, further slowing the progress of this lawsuit. short, if Mundo remains a defendant in this action, a lawsuit which is already four years old and which is based upon stale claims, more than five years old, can be expected to experience even more postponements and delays.

In sum, the factors simply point one way. For four years plaintiff has sat on its hands, although able to serve Mundo, as it recently did, at any time. Plaintiff clearly opted not to do so. Having deliberately decided not to include Mundo in this lawsuit thus far, this plaintiff should be barred from doing so at this late date.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should dismiss this action as to Mundo.

Respectfully submitted,

DONOVAN LEISURE NEWTON & IRVINE 30 Rockefeller Plaza New York, New York 10020

Attorneys for Defendant MUNDO GAS, S.A.

Of Counsel:

Sanford M. Litvack Doris K. Shaw UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

-against-

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT,
PETROMAR SOCIETE ANONYME, MUNDO GAS,
S.A. GAZOCEAN INTERNATIONAL, S.A.,
GAZOCEAN FRANCE GAZOCEAN U.S.A., JOHN
DOE and RICHARD ROE, JOHN DOE
CORPORATION and RICHARD ROE CORPORATION,
the names of the defendants, JOHN DOE,
RICHARD ROE, JOHN DOE CORPORATION and
RICHARD ROE, JOHN DOE CORPORATION and
RICHARD ROE CORPORATION being fictitious,
their real names and identities
presently unknown to the plaintiff,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT MUNDO GAS, S.A.'s MOTION TO DISMISS

This memorandum is submitted on behalf of defendant Mundo Gas, S.A. ("Mundo"), in order to reply to plaintiff's rambling 25-page opposition to the motion to dismiss for failure to effectuate service and prosecute this action against Mundo.

Plaintiff's memorandum argues virtually everything at length except the issue at hand, its failure to serve

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Mundo for more than four years. In that regard, the only reason plaintiff advances to justify its failure to serve Mundo is the claim that "[a]t the time the complaint was filed on September 25, 1969, plaintiff's counsel was aware that there would be an attack upon the jurisdiction of this Court. . . . ", and hence, plaintiff felt it would serve no purpose to serve some of the defendants until the jurisdictional issues were settled. (Plaintiff's Memorandum, p. 19) In addition, plaintiff argues that its neglect is not actionable because the delay was not "voluntary" or "contumacious" (Plaintiff's Memorandum, pp. 17-18). Mundo submits that neither of these reasons, legally or logically, excuse plaintiff's failure to effectuate service.

First, plaintiff's excuse that it was awaiting determination of the jurisdictional issues is, on its face, a desperate stab made in hindsight to attempt to justify its earlier decision. Plaintiff evidently claims that when it handed only two (in lieu of six) summons to the marshal, it knew that the two defendants it was about to serve would be the ones to challenge jurisdiction and that it made a decision at that time not to serve the other four until that issue was settled. This, we submit, is unbelievable.

Moreover, if that were plaintiff's strategy, plaintiff

guessed wrong, because, as it now recognizes, the newly served defendants also intend to challenge jurisdiction, four years after the filing of the complaint (Plaintiff's Memorandum, p. 2). Finally, even if plaintiff's reasoning were accepted, the issue of subject matter jurisdiction was settled almost two years ago and yet plaintiff did nothing in the meantime to serve Mundo or the other newly-served parties. This additional two year delay puts to rest any serious claim that plaintiff was simply waiting for the jurisdictional challenge to be resolved before leaping into action against the other defendants.

This plaintiff has proceeded at the most leisurely pace imaginable with respect to Mundo and the other newly-served defendants. With this record and particularly in view of its admission that it made a conscious strategic decision to refrain from serving four defendants (Plaintiff's Memorandum, p. 19), we do not understand how plaintiff can seriously try to argue that its failure to serve these defendants was not "voluntary." While plaintiff may not now, four years later, like the consequences of its decision, it cannot disown it. Since plaintiff did not want these defendants in this case during the past four

years, it should be barred from dragging them in at this late date.*

CONCLUSION

For the foregoing reasons and the reasons set forth in Mundo's memorandum of law, it is respectfully requested that this Court dismiss this action as to Mundo.

Respectfully submitted,

DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10020
Attorneys for Defendant
Mundo Gas, S.A.

Of Counsel:

Sanford M. Litvack Doris K. Shaw

^{*} Plaintiff's lengthy statute of limitations argument set forth at pp. 10-17 of its memorandum, is specious; it would be barred from bringing suit today (see Defendant's Memorandum pp. 7-8). However, if plaintiff truly believes that it would not be barred, we submit that the Court's dismissal of the newly-served defendants would not be prejudicial to plaintiff.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

-against-

69 Civ. 4223 (WK)

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, PETROMAR SOCIETE ANONYME, MUNDO GAS, S.A., GAZOCEAN INTERNATIONAL, S. A., GAZOCEAN FRANCE, GAZOCEAN U.S.A., et al.,

Defendants.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTIONS BY DEFENDANTS GAZOCEAN FRANCE, GAZOCEAN INTERNATIONAL, S.A., MUNDO GAS AND PETROMAR TO DISMISS UNDER RULE 41 (b) F.R. CIV. P.

I

STATEMENT

The defendants Gazocean France, Gazocean International, S.A., Petromar Societe Anonyme, and Mundo Gas, S.A., have moved to dismiss the complaint against them under Rule 41 (b) of the Federal Rules of Civil Procedure on the ground of "lack of prosecution". They contend that failure to serve the summons and complaint upon each of them until more than four years after

the action was instituted on September 25, 1969 constitutes such lack of diligence on the part of the plaintiff that the complaint should be dismissed.

Each of these defendants states that if this motion is not granted, they will file motions attacking the jurisdiction of this Court over them, the validity of the service of process, and that this will delay the progress of the case against the two defendants who have previously been served, Societe Anonyme de Gerance et D'Armement (SAGA) and Gazocean USA.

II

SUMMARY OF ARGUMENT

While it is the right of any defendant to attack the jurisdiction of the Court over it, the present motion under Rule 41 (b) is only a dilatory tactic which has no purpose other than delay. For the four and a half years since this action was commenced on September 25, 1969, co-defendant SAGA has succeeded in delaying all actions by the plaintiff.

The contention of defendants Gazocean France, Gazocean International, and Petromar, that they have been prejudiced by being deprived of the opportunity to participate in the attack on the jurisdiction over the subject matter by the other French corporation SAGA, is completely without validity, as they concede

the Circuit Court of Appeals did sustain the jurisdiction of this Court.

None of the cases submitted in support of defendants' motions were antitrust cases or conspiracy cases, and in none were the activity or non-activity of the plaintiff even remotely similar to the instant case. Here there was no lack of diligence by the plaintiff. Since it is true that if SAGA won its motion on jurisdiction, it would have applied to these defendants, there was no point to serving them until that issue was settled by the U. S. Supreme Court in 1972.

The contention that the delay is prejudicial to these defendants because they were not present during the formative stages of this litigation, and the long delay has deprived them of the opportunity to participate in the preparation of the defense is not substantiated by the record. SAGA has succeeded in stopping the plaintiff entirely in its efforts to start discovery and the very first stage of defendants' discovery has not yet been completed. Therefore, these defendants are entering the case just at the threshold of discovery, and are no worse off than if they were served at the same time as SAGA and Gazocean U.S.A.

The contention that they are being dragged into a "stale" case when the four year stature of limitations would have

run is not only legally without validity, but in fact this is a continuing conspiracy, and these defendants have been active participants continuously during the past four years.

Finally, these defendants are very solicitous in urging that a dismissal will save this Court from having the progress of the case delayed. Plaintiff responds that the situation is exactly the opposite - that a dismissal will delay the progress of the case, as it will be much more difficult for plaintiff to obtain discovery of these defendants by depositions and discovery of documents if they are not parties to the action.

In order that this Court may have an understanding of the background of the case essential to a determination of these motions, plaintiff will give a brief outline of the facts. Since plaintiff has served answers to SAGA's interrogatories (referred to here as "Ans."), and produced hundreds of documents in response to SAGA's request for production (referred to herein as "RPD") reference will be made to these in support of plaintiff's allegations of facts.

STATEMENT OF FACTS

Plaintiff is a substantial Swiss business enterprise which has for many years engaged in worldwide trading in steel and other metals, chemicals, and other raw materials (Ans. la). This included trade and commerce between the United States and Europe.

Plaintiff is also engaged in manufacturing pharmaceuticals, with a plant in Germany, and sales offices in several European countries. Other interests include ownership of apartment houses and office buildings in Zurich.

In 1967 there was a unique market situation in the world in which there was a surplus of vinylchloride monomer (VCM) in the United States and a shortage in Europe. VCM is a petrochemical product which is the foundation of much of the modern plastics industry. VCM is converted into polyvinyl chloride (PVC), from which are made countless products such as construction pipes, furniture, upholstery, draperies, wall coverings, floor tiles, table cloths, toys, clothing, footwear, gardenhoses, paints, phonograph records, bottles, imitation leather, and many others.

Plaintiff's extensive experience in trade between the

United States and Europe caused it to inquire why this surplus VCM in the United States was not being exported to Europe, where there was an urgent need. Plaintiff learned that there were technical problems in transporting this chemical over long distances such as the Atlantic Ocean as it was very dangerous to handle and there was risk that it would be polymerized during the voyage, causing irreparable damage to both the cargo and the ship. Through research plaintiff developed a technical capability to transport the VCM from the United States to Europe and was solely responsible for opening up the European market for United States exports. Due to the special requirements of the tankers which would be capable of transporting of VCM there were only a limited number of such tankers available in the entire world in September 1968 and these were controlled by SAGA and Gazocean. The only other company with available tankers which could be adapted to transport VCM was Mundo Gas (Ans. 3, 4, 9c, 17a, 19b).

In September 1968 plaintiff negotiated separately with Gazocean and SAGA for time charters to transport the VCM from the United States to Europe. Each offered a freight rate of \$23 per metric ton. (RPD 10, 22) Plaintiff chose to enter into a contract with SAGA dated October 12, 1968 to transport 17,000 tons with an option for plaintiff to increase this

quantity to 25,000 tons if exercised by January 1969. Plaintiff conducted extensive negotiations with U.S. suppliers of VCM, such as Ethyl Corporation (Ethyl) and B. F. Goodrich Company (Goodrich).

Plaintiff was the "pioneer" which took the risk on this historical experimental shipment on the "TROIKA" in November, 1968. Since plaintiff had developed the technical capacity and know-how, it took the responsibility for determining the proper equipment on the ship, and on the loading docks in the U.S. ports and unloading docks in European ports.

Plaintiff or people employed by plaintiff as experts checked every piece of equipment that was being used for the transportation of this gas, as it had to be done in the limits plaintiff had computed, or the whole project would have en a failure. It not only would have been a failure for the individual shipment, but it would have probably ruined any hopes for the success of the project once there was a failure. It would have been most difficult to convince people that they had to spend more money to develop any improved equipment after a failure, so being right the first time was important and plaintiff personally supervised every aspect of it. (Ans. 3, 4, 17, 18)

The first commercial shipment of VCM was supplied by Ethyl from Houston on November 2, 1968 and part was delivered in Spain and the balance to Pechiney-ST. Gobain in France. The success of this first commercial shipment of VCM across the ocean led the plaintiff to enter into a contract with Ethyl to supply 40,000 to 45,000 tons and a contract with Pechiney to purchase 24,500 tons. (RPD 10) Having succeeded with the first shipment, and obtained a supply contract from Ethyl, plaintiff negotiated a new contract with SAGA to ship up to 50,000 tons. (Ans. 18a)

The success of the venture led plaintiff to seek as much shipping capacity as it thought it might be able to use. In January, 1969, it had discussions and communications with Gazocean France and received a telex dated January 29, 1969 offering a price of \$33. a ton. (RPD 22). The first significant document which was evidence of the conspiracy was a telex from SAGA to plaintiff dated February 5, 1969 raising its price of transporting the VCM from \$23. to \$32. a ton. (RPD 20). These two telexes indicated to plaintiff that SAGA and Gazocean had reached an agreement on parallel pricing quotations to plaintiff for transporting VCM. This conspiracy between SAGA and Gazocean placed plaintiff in a very difficult position, as it had made contracts to purchase it in the United States and deliver to

customers in Europe at prices based on the transportation cost of \$23 a ton and could not economically pay \$32. or \$33. Therefore, it sought other shipowners who owned or controlled ships which were suitable for carrying VCM. This led plaintiff to defendant Mundo Gas which was the only other shipowner capable of carrying VCM in its vessels. (RPD 26) On March 17, 1969 Joseph Muller, President of plaintiff, negotiated with representatives of Mundo Gas a contract to transport 25,000 tons of VCM from the U.S. to France for \$23. a ton. However, Mundo Gas had a meeting in London with representatives of SAGA on or about May 12, 1969 following which Mundo Gas sent a telex to plaintiff raising its price to \$32. a ton. (RPD 23, 26,27) Thus, the three companies which together had a monopoly on the available liquefied gas tankers suitable for transporting VCM at economical prices conspired to eliminate plaintiff from this market by agreeing on a price of \$32.-\$33. a ton which they knew was uneconomical for plaintiff. (Ans. 18, 19, 20c, 33, 45, 50)

THE STATUTE OF LIMITATIONS IS NOT A PROPER ISSUE ON THIS MOTION

The defendants contend that the statute of limitations would have run if the plaintiff had attempted to file a new complaint now, and therefore they should not be held under the original complaint which was filed in time.

The first answer to this contention is that a defendant does not have a right to raise the statute of limitations as an objection simply because it was served with the summons after the statutory period may have run, where the complaint was in fact filed within the time period. Lippasco v. Levey, Inc., 305 F. Supp. 175 (D.C. Vt. 1969) Second, the defendants have no support at all for the contention that the statute of limitations would have run if the action had just been commenced.

The complaint was filed on September 25, 1969, and the defendants SAGA and Gazocean U.S.A., were served shortly thereafter. The summons and complaint were served upon the four moving defendants in December, 1973. If a new complaint had been filed, the statute of limitations would apply to acts of defendant prior to December, 1969, so only two months are involved at the most.

The complaint alleges that since at least December 1968

to have a world-wide monopoly of transportation by special ships, tankers and freighters available for the transportation of such products as VCM, the product involved in this case. There is nothing in the complaint to justify any inference that it alleges a conspiracy which ended prior to the filing of the complaint. On the contrary, the language clearly states that the conspiracy was continuing to damage the plaintiff.

Plaintiff's answers to SAGA's interrogatories and numerous documents furnished in response to SAGA's request demonstrate that after the first evidence of the conspiracy appeared in February, 1969, plaintiff made strenuous efforts to negotiate with the defendants in the hope of terminating their conspiracy. Plaintiff was not interested in a lawsuit, it was interested in avoiding the financial loss being forced upon it by defendants. There is one aspect of this case which is unusual. The conspiracy developed and grew despite the vigilance of plaintiff's American attorneys, Raphael, Scarles & Vischi, who were consulted by plaintiff about the problem as it developed. When the plaintiff's efforts to stop the conspiracy failed, its American lawyers saw what was happening, and recommended instituting this lawsuit to curb the violation, prevent it from recurring, and make the plaintiff whole for its damage. The impact of the violation on

plaintiff started during the period January to June 1969, and this action was commenced on September 25, 1969. (RPD 26)

and 2 of the Sherman Act which can be established by direct proof. The reason why there is direct evidence of the conspiracy is because the principal defendants are foreign companies who did not consider themselves subject to the United States antitrust laws. Therefore, they did not attempt to conceal their actions in all respects, and those which were visible are more than sufficient to establish a conspiracy to violate the Sherman Act, and consequent damage to plaintiff.

The success of the defendants in establishing and maintaining a monopolistic position is verified by an independent economic report published in February 1973. Excerpts attached to plaintiff's answers to interrogatories are annexed hereto as Exhibit 1.

Recognition by SAGA that the complaint did allege a continuing conspiracy is that all of the interrogatories covered the period January 1, 1967 to the date of the answers which was September 1973. In these answers the plaintiff pointed out that the defendants had continued to refuse to charter ships to it, had continued to deprive it of customers and do acts of injury to it throughout 1971, 1972 and 1973. (Ans. 18 a, 19 b, 20 c,

33, 45, 45 b, 50) Under the rules applicable to amendments of pleadings, there is no doubt that prior to trial the plaintiff will be permitted by the Court to amend its complaint so as to specifically allege various acts by the defendants which have caused it damage up to the time of trial.

The major damage to plaintiff was based upon the continued acts by the defendants after December 1969, so that even if a new complaint had been filed, the four moving defendants would be responsible within the period of the statute of limitations. When the complaint was filed in September, 1969, it claimed damages for only \$2,000,000. But since the complaint was filed, and the defendants continued actively their conspiracy, the damages have increased greatly.

Plaintiff projected a profit of \$15.00 per ton on this VCM delivered to Europe. After the success of the first shipment, plaintiff made a contract with Ethyl for 45,000 tons, and with Goodrich for additional tonnage. Plaintiff then made contracts to sell this VCM in Europe and actually delivered to customers 57,980.88 metric tons, for which plaintiff received payment of \$7,919,553. Those customers include some of the largest and most influential companies in Europe. Attached hereto as Exhibit 2 is a list of these customers given to SAGA in RPD 4. But for the defendants' conspiracy plaintiff would have realized a gross profit at \$15.00 a ton on approximately

\$800,000. There were <u>no</u> exports of VCM from the U.S. to
Europe until plaintiff pioneered the creation of this market
in 1968, and established the technical and economic feasibility
of transocean shipments. The market opened up by plaintiff
grew quickly to imports in Europe of between 200,000 and
300,000 tons per year. (Ans. 64b) If plaintiff had not
been prevented by the conspiracy from participating in this
market its profits could have been \$3,000,000 or more per year.

During 1969 and 1970 plaintiff negotiated sales of VCM to its customers and other new customers covering their requirements of VCM as far ahead as 1975. Attached hereto as Exhibit 3 is a list of such customers and prospective quantities which is part of RPD 69. This shows an estimated profit of \$24,096,000.

Once the technical and economic feasibility of transporting VCM from the United States to Europe was proven by the success of the first shipment of VCM across the Atlantic Ocean in November 1968, plaintiff embarked on studies and plans for creating and expanding this market.

On September 16, 1969, plaintiff caused to be organized in Bermuda Finance & Investment Company, Bermuda, Ltd. for the purpose of constructing in the Caribbean area a huge plant to manufacture VCM and related products. This company

had a stock offering of \$100,000,000. (RPD 2) Due to the conspiracy by defendants, plaintiff and this company were unable to proceed with their plans for the construction of this big VCM complex, resulting in tremendous losses to plaintiff. (Ans. 2d)

At the time the answers to interrogatories were filed in September, 1973, plaintiff submitted detailed calculations of damages caused by the defendants estimated at over \$37,000,000. (Ans. 64e).

December 1968 up to the present time, even if this complaint should be dismissed for lack of prosecution, there is nothing to stop the plaintiff from bringing a new complaint against these defendants for all of the acts which have been conducted during the last four years. Such a complaint would be no different from the amended complaint which will be permitted by the Court prior to trial. A new complaint could allege all of the acts prior to the four-year period to show the commencement of the conspiracy, and then proceed into the statutory period so that it would be clear that the statute of limitations did not bar the action. An illustration of this type of actions by the defendants in April, 1970 is shown in Exhibit 4 attached hereto. (RPD 64) In an antitrust case

the four year statute only bars damages which occurred prior to the four year period, but does not bar damages which concintue to occur as a necessary effect of the acts done prior thereto where the defendants continued to do acts in furtherance of the conspiracy. Charles Rubenstein, Inc. v. Columbia Pictures Corp., 154 F. Supp. 216 (D.C. Minn. 1957).

THE DELAY IN SERVING THE MOVING DEFENDANTS WAS DUE TO ACTIONS BY A CO-DEFENDANT, AND NOT TO LACK OF DILIGENCE BY PLAINTIFF

Defendants' contention that mere delay in and of itself constitutes lack of due diligence authorizes a court to dismiss for lack of due diligence is not supported in any of the cases they cite. Although F.R. Civ. P. 41 (b) grants the Court authority to dismiss a plaintiff's action for lack of due diligence in its prosecution, District Courts are reluctant to deny plaintiffs their day in court under this rule. Even in Messenger v. United States 231 F. 2nd 328 (2nd Cir. 1956) the principal authority relied upon by defendants, the Court stated that a reasonable or excusable delay would not bar a plaintiff's action. For example in Welsh v. Automatic Poultry Feeder Co., 439 F. 2nd 95 (8th Cir. 1971) an action was dismissed where the plaintiff's delay originates from a "conscious" or "voluntary" noncompliance with the Rules of the Court. On the other hand, in Spering v. Texas Butadiene & Chemical Corp., 434 F. 2d 677, (3d Cir. 1970) a delay caused in the process of gathering evidence in a complicated case was held to be reasonable and excusable. Therefore, dismissal of the plaintiff's case is permitted "only" in the face of a clear record of delay or "contumacious" conduct of

the plaintiff. <u>U.S.</u> v. <u>Inter-American Shipping Corp.</u> 455 F. 2d 938 (5th Cir. 1972); <u>Durham v. Florida East Coast Railway Company</u>, 385 F. 2d 366 (5th Cir. 1967).

In each case cited by the defendants in their briefs, the plaintiff has either voluntarily noncomplied with the rules of the Court or is guilty of contumacious conduct. For example, plaintiff deliberately disregarded known procedure, Messenger v. United States, supra., Campbell v. Playchak, 21 FRD 41 (E. D. Pa. 1957); plaintiff remained absolutely inactive for a period of two to nine years, Spering v. Texas Butadiene & Chemical Corp. 434 F. 2d 677, (3rd Cir. 1970), S & K Airport Drive In Inc. v. Paramount Film Distributing Corp. 58 FRD 4 (E.D. Pa. 1973), States Steamship Co. v. Philippine Air Lines, 426 F. 2d 803 (9th Cir. 1970); plaintiff himself was the cause of the delay, Taub v. Hale 355 F. 2d 201 (2d, 1966), Redac Project 6426 Inc. v. Allstate Insurance Co. 412 F. 2d 1043 (2d Cir. 1969); plaintiff neither directly nor indirectly informed defendant of the damages, and defendant had no means of knowing the damage, Richardson v. U.S. Shipping Co., 38 FRD 494 (N.D. Cal. 1965), Howmet Corporation v. Tokyo Shipping Co., 318 F. Supp. 658 (D. Del. 1970); plaintiff offers absolutely no reason for the delay, Dewey v. Farchone, 460 F. 2d 1338 (7th Cir. 1972), Durst v. National Casualty Co., 452 F. 2d 610 (9th Cir. 1972).

In the instant case, plaintiff's delay in serving process on these defendants was justified. At the time the complaint was filed on September 25, 1969, plaintiff's counsel was aware that there would be an attack upon the jurisdiction of this Court based upon the contention that the France - Switzerland Treaty deprived this Court of jurisdiction.

SAGA did file such a motion and it was denied by

Judge Lloyd F. MacMahon on June 23, 1970 (314 F. Supp. 439).

There had been two separate complaints filed. One under the antitrust laws and the other for breach of contract. On November 11,

1971 the Court of Appeals for the Second Circuit affirmed Judge

MacMahon on the antitrust complaint and reversed him on the contract complaint (451 F. 2d) 727. SAGA filed a petition for certiorari which was denied by the U. S. Supreme Court on April 24,

1972. (406 U.S. 906)

One ground of the motion of the two Gazocean defendants and Petromar is that they were deprived of the opportunity to participate in the argument on the SAGA motion. They state that if the SAGA motion had been granted they would have been dismissed from the case. It is difficult to see what merit this argument has, as the Court of Appeals has made the law on this point against them. If these defendants believe that they could

have brought about a different legal decision by the Court of Appeals, they are not stopped from asserting that same ground in their own motions attacking the jurisdiction of this Court and ultimately trying to persuade the Court of Appeals to overrule its prior decision. However, this is not a ground for a motion to dismiss under Rule 41 (b).

By taking advantage of its right to attack the jurisdiction of this Court, SAGA succeeded in stopping all action by the plaintiff for two years and eight months. After it lost the jurisdictional attack, it succeeded in delaying discovery by the plaintiff up to the present. On the other hand, SAGA has been in complete control of the steps involving discovery by the defendants against the plaintiff, and has succeeded in delaying those actions so that even the first step in the way of discovery has not been completed.

Due to SAGA's efforts contesting the jurisdiction of this Court, it did not answer the complaint until May 7, 1972 nearly three years after the action had begun. Two months later, in July, when counsel for the plaintiff suggested a schedule for the taking of depositions of former SAGA employees in Europe, SAGA's counsel took the position that SAGA should take the deposition of the president of plaintiff Joseph Muller and his employees first. (Dubuc affidavit February 22, 1973) From July 1972 until the present, SAGA's counsel has been able to maintain that tactical

position. He did not serve any notice to take depositions of plaintiff until February 7, 1973, yet the first deposition has not yet been taken because he insisted on having answers to written interrogatories and the production of documents for inspection before he commenced the taking of the depositions.

SAGA's counsel served the interrogatories and a Request for Production of Documents in July 1973. Unlike the plaintiffs in Dewey v. Farchone, supra, and States Steamship Co. supra, cited by defendants, voluminous responses were made by the plaintiff in September, but instead of proceeding to take the deposition of Mr. Joseph Muller, president of plaintiff, SAGA's counsel obtained an order to show cause on October 4, 1973 to dismiss the complaint for failure to make proper responses or in the alternative to require further responses. This Court has not yet acted on this motion.

Since the plaintiff's delay is due, not to a disregard of judicial procedure, but rather compliance with the judicial procedure invoked by SAGA; not to the plaintiff's absolute inactivity, but rather to extreme activity necessitated by SAGA's requests; not to a delay caused by the plaintiff, but rather a delay caused by SAGA; this Court should not invoke the harshness of F. R. Civ. P. 41 (b) to deny plaintiff's plea for damages.

DESPITE THE PLAINTIFF'S DELAY OF SERVICE, THE MOVING DEFENDANTS HAVE KNOWN ABOUT THIS CASE FROM ITS INCEPTION.

Courts have generally recognized that even if service of process is delayed, a motion to dismiss will be denied if the defendant has knowledge of the plaintiff's asserted damages.

Howmet Corporation v. Tokyo Shipping Co., supra. In the instant case, the plaintiff's answers to SAGA's interrogatories and the documents submitted in response to its request for production of the documents supply evidence substantiating the allegations of the complaint. They show that all of these defendants have intimate knowledge of the case and its progress from its inception.

Gazocean France and Gazocean International are part of the same corporate family as the defendant Gazocean U.S.A. (See Exhibit 1.) The complaint alleges, and the documents submitted establish, that Gazocean France was a leading member of the conspiracy in violation of the antitrust laws and acted through Gazocean U.S.A. and Gazocean International. These three corporations have some common officers and it cannot be stated with any sense of accuracy that each of these corporations was not completely familiar with all of the proceedings which have

taken place in this Court from the beginning. They certainly all knew that the complaint was filed and that they were named as defendants.

The exhibits show that Petromar was the agent for defendant SAGA, and was an intimate part of all of the transactions which are the basis for the plaintiff's contention that there was a conspiracy in violation of the antitrust laws. As agent for SAGA it is fully familiar with the fact that this complaint was filed and all the proceedings which have taken place.

The documents show that all of the defendants continued their conspiracy to refuse to charter ships to the plaintiff long after the complaint was filed and there is clear evidence that Mundo Gas also was fully familiar with the fact of the filing of this action and that it was named as a defendant.

PLAINTIFF'S DELAY HAS NOT PREJUDICED THESE DEFENDANTS

These defendants contend they will be prejudiced because (1) they were not present during the formative stages of the litigation, and (2) they have been deprived of an opportunity to participate in the preparation of their defense. Finally, they urge that the progress of the suit will be adversely affected if they are now brought in as active defendants.

Due to the delaying and dilatory tactics of the defendant SAGA, none of these points raised by these defendants are valid.

As explained in Point V, SAGA has succeeded in delaying the start of any discovery by the plaintiff. When plaintiff's answers to SAGA's interrogatories were served, SAGA's counsel filed an order to show cause to dismiss the complaint for failure to make proper responses. Therefore, even the first step in the way of discovery has not been completed. These moving defendants are coming into the case at the very threshold of the commencement of discovery by any party. Their contention that they will be prejudiced because they were not present during the formative stages of this litigation cannot be substantiated.

VIII

CONCLUSION

Defendant's motion for dismissal is untenable. The cases where dismissal was granted for lack of due diligence were only in the face of a clear record of lack of activity or contumacious activity of the plaintiff. The plaintiff's actions were not contumacious, he never attempted to confuse or delay the proceedings of this Court - although the defendant SAGA has so accomplished. The plaintiff filed its complaint and was ready to expedite movement of the case to trial. SAGA, however, first filed a motion for dismissal for lack of jurisdiction, then filed a motion for dismissal for failure to make proper responses to SAGA's interrogatories. As a result of SAGA's activities the case has not progressed any further than if these defendants had been served at the same time as SAGA and Gazocean.

It is clear from the recital of facts that the four moving defendants will have to be subjected to discovery by the plaintiff whether or not they are active parties in the litigation. It will be necessary to take their depositions and to request documents from each of them since they are active participants in the conspiracy. Accordingly, having them become active parties to litigation will not adversely affect

the progress of the case but on the contrary will expedite it as it will be much simpler to obtain discovery of these defendants when they are parties, than if they are third parties.

Dismissal of this complaint will not save any time or effort of this Court, as plaintiff has the right to file a new complaint against these defendants, then there would be two complaints, which would later be consolidated. If these defendants wish to attack the jurisdiction of this Court over them, let them answer plaintiff's jurisdictional interrogatories, file their motions and be heard.

Of Counsel:

Joseph W. Burns

Respectfully submitted,

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Attorneys for Plaintiff

• The Dennand for Chemical Carriers

There has been a tremendous expansion of the world gas tanker fleet, especially since the beginning of the 1960s, since this was when large-scale gas tankers (carrying more than the maximum for semi-refricerated tankers -around 13,000 m3) became a viable investment proposition. Since 1961 then, although a significant number of small and sophisticated gas tankers have been built in the 1960s, the bulk of the growth in capacity of the world gas tanker fleet has been attributable to fully refrigerated wessels of 13,000 m3 and above. Indeed, as previously mentioned, LPG tankers of almost 100,000 m3 have already been launched, while next year (1974) should see the operation of the first 120,000 m³ LNG tanker.

TABLE XXVIII Ownership of Gas Tanker Fleet — end 1972

Number of	
	DWT
254	1,170,976
112	541,255
17	200,013
18	336,314
27	29,098
428	2,377.656
	112 17 18 27

As evident from the preceding table, by far the bulk of the gas tanker fleet operating at the end of 1972 operates under the European flag. In terms of deadweight tonnage just under one-half of the total fleet flies European flags, the Japanese fleet being the next most important accounting for some 22.6% of the 2.38 million DWT operating. In fact the dominance of the gas tanker fleet by European owners is even more extensive than is indicated by the above figures, since not only are several of the tankers operating under the Liberian and Panamanian flags effectively part of European owning or operating groups, but also this is true of a number of vessels operating under other national flags. The Gazocean group for instance, as an international group operates a small part of its total fleet under Argentinian and Chilean flags.

The 27 vessels included in the 'Other Flags' category in the above Table operate under a total of 11 different flags, these being Algerian, Argentinian, Mexican, Brazilian, Russian, Australian, Filipino, Madagascan, U.S. and Venezuelan.

International Gas Tanker Consortia

One of the most noticeable changes which have taken place as regards the ownership of the world gas tanker fleet, largely as a result of the speed of the fleet's growth, has been the formation during the last half of the 1960s of several owner/operating consortia for gas

tankers. Perhaps the main factor behind the formation of these operating groups is a defensive one, since at one time in the 1966-1969 period, it would have been understandable if an outside observer had assumed that one company - Gazocean - operated all but a small proportion of the gas tanker fleet. The Parisbased Gazocean had several advantages over other owners at the time, since the international nature of the company's operations and subsidiaries afforded significant advantages in terms of finding business for tankers. As a result, at one stage when Gazocean's own tonnage had a capacity of just under 200,000 m3, the company also had on timecharter a further estimated 100,000 m3. Not only did Gazocean have the advantage over smaller owners as a result of its international operations, but also the company has not restricted its commerical shipping activities solely to operating owned and chartered tonnage, taking an increasingly active role in the field of gas trading as a merchant and trader itself.

Faced with what seemed the probability that Gazocean would continue to dominate the gas tanker and trading markets, several smaller independent owners have banded together to form international consortia in an effort to combat what had the makings of a monopoly situation. While none of these large owning groups can yet claim to rival Gazocean in terms of fleet size or range of activities, their formation represents one of the major developments on the gas tanker market of the 1960s. The bulk of the owner participants in these consortia are European, as might be expected from the fact that some 49% of the world gas tanker fleet operates under European flags.

Gazocean SA

The involvement of the Paris-based Gazocean SA in the gas tanker market stems almost from the company's foundation in 1957; in 1958 Gazocean took delivery of its first liquefied gas tanker, the 837 DWT Loex, a conversion which still operates for the group under the name Pericles. Today the company owns some 20 tankers directly through subsidiaries or affiliates, and in addition to the affiliate companies which actually own and operate gas tanker tonnage, the Gazocean group includes various organizations (several outside France) which are concerned with either marketing or the development of gas tanker technology.

In total, over 20 separate companies operate within the Gazocean group either through direct links with Gazocean SA, or through Technigaz (the 75.5% Gazocean affiliate in the gas tanker technology field), or through the Swiss-based holding company, Gazocean International, 37% owned by the Paris-based

parent company. This latter holding company represents Gazocean's interests in all ship owning groups established outside France, while the Gazocean tankers operating under the French flag are owned and managed by a 99% subsidiary Gazocean Armement, with the exception of the methane tanker Jules Verne which is owned by the Gaz Marin consortium in which Gazocean has an 11% shareholding.

The distribution of the Gazocean gas tankers, both geographically and in terms of size and cargo capabilities, is wide, with the result that the group's activities are not restricted to any particular area of operation. In addition to being involved in both shortsea and deepsea movements of the standard LPGs and chemical gases (ammonia, vinyl chloride monomer, propylene, butadiene, etc.), whose boiling points at atmospheric pressure are below - 50°C, Gazocean's participation in the development of commercial liquefied natural gas tankers has given the group the necessary experience in cryogenic gas transportation to include products such as ethylene and, of course. LNG in the range of materials handled by the group's fleet. Until recently, the Gazocean fleet included only one vessel specifically designed for the transport of ethylene, this being the 1,005 DWT Thales, currently operating under the Italian flag as the Talete, having been sold by Gazocean late in 1972. Today however, the company's involvement in the ethylene trade stems solely from its ownership of the experimental methane tankers Pythagore and Euclides, although even the latter vessel is currently moving LNG between Algeria and the U.S., lifting ethylene on relatively few occasions.

TABLE XXIX

Gazocean SA's Fleet

NAME	DWT	TANKS	BUILT
Aristotle*	4,830	5	1945, conv. 1958
Pericles	837	not available	1951, conv. 1958
Socrates	942	7	1953, conv. 1961
Zeilen	528	2	1961
Lavoisier**	6,265	6	1962
Vinci	1,083	6	1962
Arago	518	6	1963
Newton	1,848	8	1964
Pythagore***	542	2	1964
Jules Verne*	13,877	7	1965
Moti	1,174	6	1965
Arquimedes	11,002	3	1967
Zenon	11,008	3	1967
Kristian Birkeland	16,526	3	1968
Humboldt	5,165	6	1968
Carnot	930	4	1969
Gay Lussac	28,986	3	1969
Cevendish	29,077	3	1971
Descartes*	32,000	6	1971
Euclides***	3,197	4	1971
Faraday	24,753	3	1971

^{*}LNG (methane) tanker

Having been active at an early stage in the development of gas tankers for lifting liquefied methane, Gazocean is now deeply involved in commercial contracts to move what will soon develop into substantial long-term tonnages of this commodity. In addition to the three smaller experimental LNG carriers, Gazocean currently operates two larger tankers one of which has been in operation since 1965 carrying LNG from Algeria to Havre, while the other. launched in 1971, has recently started moving liquefied methane from Algeria to Fos in southern France, after having been involved for several months in the Latin American LPG trade. Gazocean has strong links with the stateowned Algerian oil and gas organization, Sonatrach, which markets the natural gas shipped to France. Gazocean and Sonatrach have in fact formed a joint-subsidiary. Alocean, whose purpose is to develop the marketing of Algerian LNG in overseas markets. In addition to the two tankers already moving Algerian material. Gazocean has further LNG tanker capacity due for operation during the early 1970s. Through its 12% shareholding in Cie. des Messageries Maritimes, the group will take delivery of the Tellier, a 40,000 m3 LNG tanker this year. This will be followed in 1974 by the first of what will be the standard size, long haul LNG tanker. the 120,000 m3 Benjamin Franklin, which will move Algerian methane from North Africa to the U.S. It is not yet clear what is implied by the withdrawal of Gazocean's share in this vessel, reported at the end of 1972. A sistership to the Benjamin Franklin is due to be launched in 1975 and later to be handed over to the Gazocean group to increase the gas movements between Algeria and the U.S. from the mid-1970s onwards.

What additional investment is planned by the Gazocean group in the gas tanker field remains as yet unknown, but certain conclusions may be drawn. The extensive involvement of Gazocean, especially during the last halfdecade, in the development of the LNG trade has not been accomplished at the expense of the group's LPG interests, and it is possible that it is this sector that Gazocean is now looking to once more as an outlet for investment capital. While the next fifteen years will undoubtedly witness a tremendous expansion of the world LNG tanker fleet, some estimates indicating the need for something like 100—150 tankers of the 120,000 m³ size by the late 1980s. the scope for the involvement of individual shipowners even as large as Gazocean are rapidly disappearing. On the one hand there is the increasingly crushing cost factor, a 120,000 m³ LNG carrier costing \$70 million at today's costs given available yard space, and this itself is becoming an increasingly critical factor. On

^{**}LPG/solvents tanker

^{***}LNG (methane)/ethylene tanker

of the two companies are operated virtually as one, since at various times in the recent past some of the Gas Traders' vessels have operated apparently on time-charter to the Gazocean group.

Gas Traders existing newbuilding programme is apparently restricted to one tanker, but since this has an anticipated deadweight of some 66,000 m³, the capacity of the consortium's fleet will be considerably increased when this tanker is handed over, a process which is scheduled for this year.

Mundo Gas SA

Although not strictly formed by a group of gas anker owners and as a result not strictly falling within the category of a gas tanker consortium, he Mundo Gas organization is worthy of brief examination in this context as a result of its relationship with the Peninsular and Oriental Steam Navigation Co. (P&O) and the latter's uture gas tanker plans through its operating subsidiary, the London-based, Trident Tankers 1.td.

The P&O is understood to have a shareholding of some 30% in Mundo Gas, the remaining share capital reportedly being divided by various organizations, including the Norwegian Divind Lorentzen group. The Mundo Gas fleet comprises six gas tankers with an aggregate deadweight tonnage of 46,226 DWT, and in addition to the Caribbean and Latin American LPG trade which has provided considerable employment for vessels within the fleet, Mundo Gas tankers have been involved extensively over the last year or so moving vinyl chloride monomer from the U.S. Gulf to various destinations in Europe, notably the U.K., Norway and Belgium.

TABLE XXXII Mundo Gas SA's Fleet

NAME	DWT	TANKS	BUILT
Monomer Venture	4,626	4	1945, conv. 1962
Aundogas Brasilia	8,600	5	1961
Aundogas Caribe	1,795	2	1965
Aundogas Bermuda	7.060	4	1967
Aundogas Rio	15,500	4	1967
Aundoras Atlantic	8 6.15	4	1969

Although Mundo Gas itself has not innounced plans for any additions to its fleet inder the company's own ownership, its relaionship with the P&O is considerably expanding the size of its fleet comprising both owned and managed vessels. P&O has invested significantly in gas tanker newbuildings during the ast two years, having placed orders through ts tanker subsidiary Trident Tankers for three arge LPG/ammonia tankers, as well as sharing ownership with A.P. Moller and Fearnley &

Eger in an LNG newbuilding. P&O recently bought a fourth LPG tanker, the 14,000 m³ Butanaval, now operating as the Gambhira. Of the LPG/ammonia tankers two have tank capacities of 30,000m3 (Gazana and Gambada) while the third (the Garmula) has a storage capacity of 52,000m3. All three vessels were launched by mid-July 1972, and the Gazana is already operating, on timecharter to Mundo Gas as will be the Gambada when it is handed over. Trident's larger LPG vessel, the Garmula, is another matter, however, and Mundo Gas are understood to have declined the opportunity to engage this vessel on timecharter. This reluctance to include a 52,000m3 among the Mundo Gas vessels is believed to reflect an unfortunate development on the LPG market. Over a space of two years (1973 and 1974) no less than seven LPG/ammonia tankers of the 52,000/53,000 m³ size range are scheduled to start operations, and although it is quite feasible to expect this tonnage to be absorbed into various trades over a period of time, it seems that at this particular stage in the development of LPG trade, 52,000 m³ LPG/ammonia tankers are in limited demand. Unless there is a major rebuilding programme for land-based storage facilities for the major liquefied chemical gases traded (e.g. ammonia), it is more likely that these vessels will find their first employment moving either butane or propane for which their comparatively large size makes them more suitable. P&O are also believed to have placed an order for yet another LPG/ammonia tanker, this (their fourth) having a proposed capacity of some 22,000 m³. Whether this, like the two 30,000 m³ ships, will be timechartered by Trident Tankers to Mundo Gas remains unconfirmed, but it is a distinct possibility.

Multinational Gas & Petrochemical Co.

The most recently formed of the European gas tanker consortiums, Multinational Gas & Petrochemical Co. brings together the gas tanker interests of European, U.S. and Japanese organisations into an operating group handling some nine gas tankers of a total 69,000 DWT. The consortium was created in late 1970 by the Phillips Petroleum subsidiary, Philtankers Inc., the Bridgestone Tyre/Mitsui affiliate, Bridgestone Ekika Gas, and the French gas tanker operator, Ste. Anonyme de Gérance et d'Armements (SAGA).

In early 1969, the French partner in Multinational — SAGA — had already formed part of another international consortium in the general area of gas tanker operations, this latter being the Franco/German concern based in Hamburg. Gas Tanker GmbH. Four companies had shareholdings in this consortium:

SALES OF VCM TO CUSTOMERS IN EUROPE as requested in par. 4 of the RPD

COMPANY	AMOUNT in \$	QUANTITY in metric tons
B.P. CHEMICALS, Glamorgan/Wales	1'577'263.70	10'917.60
CHEMISCHE WERKE HUELS, Marl/Germany	396,800.00	2'700.00
ETINO QUIMICO, Barcelona/Spain	385 697.14	2*844.42
HISPAVIC INDUSTRIAL SA, Barcelona/Spain	44'990.30	315.50
UGINE KUHLMANN, Paris/France	842 954.51	6'093.59
LONZA AG, Basel/Switzerland	13'480.00 /	101.35
REPOSA, Madrid/Spain	137'000.00	1,000.00
SMPA, Courbevoie/France	439'217.58	3 225.14
RUMIANCA SPA, Turin/Italy	139'792.10	987.93
SOLVIC SA, Jemeppe s.S./Belgium	6 414.26	48.23
PECHINY SAINT GOBAIN, Neuilly s.S./France	3'530'843.95	27'047.12
WACKER CHEMIE GMBH, Munich/Germany	405'000.00	2,700.00
TOTALS	\$ 7'919'553	57'980.88 metric tons

LIST OF CUSTOMER AND PROSPECTIVE CUSTOMERS OF THE PLAINTIFF TO WHOM VCM WAS SOLD OR COULD HAVE BEEN SOLD IN THE YEARS FROM THE END OF 1969 TO THIS DATE AND ONWARDS, HAD THE DEFENDANTS CONTINUED TO HONOUR THEIR CONTRACTUAL OBLIGATIONS AND NOT CONSPIRED AND AGREED ON A PARALLEL PRICE TO THE DISADVANTAGE OF THE PLAINTIFF.

CUSTOMER	Date	Quantity metric tons per year
SOCIETE NATIONALE DES PETROLES D'AQUITAINE (SNPA) Courbevoie/ France	5 Sept. '69 9 Feb. 1970	400 150'000 per annum over 5-10 years
BADISCHE ANILIN & SODA FABRIK AG (BASF) Ludwigshafen/Germany	22 May '70	100'000
B.P. CHEMICALS (UK) LTD. London/England	11 Jan. '71	30'000 - 50'000
GOODYEAR INTERNATIONAL CORP. Akron/Ohio U.S.A.	16 Dec. '69	no amount specified at that time
FCSFATBOLAGET Stockholm/Sweden	14 July '70	30 1000
IMPERIAL CHEMICAL INDUSTRIES LTD. Runcorn/England	27 Oct. '69	25'000 - 50'000 p.a. over 5 years
MONTECATINI EDISON SPA Milan/Italy	25 Oct. '68	25'000
MONSANTO IBERICA SA Barcelona/Spain	20 Nov. '70	60'000 - 70'000 over 10 years
PECHINY SAINT GCBAIN Neuilly s.S./France	21 Jan. '70 3 Aug. '70 15 July '70	50'000 p.a. over 5 years 6'000 10'000
RHONE POULENC (STE DES USINES CHIMIQUES) Paris/ France	20 Oct. 69	no amount specified at that time
SOLVIC SPA Milan/Italy	31 Oct. '69	5'000 - 10'000
UGINE KUHIMANN (STE DES USINES CHIMIQUES) Paris/France	28 April '70	50'000
WACKER CHEMIE GMBH Munich/Germany	28 Nov. '69	5'000

TOTAL AMOUNT (metric tons)

1'606'400 for the period 1969 to 1973

24'096'000.-

LUPPUA BUITADUTADU BELLUB AUGULL

MANUFACTURERS, IMPORTERS AND EXPORTERS OF RAW MATERIALS FOR THE IRON & STEEL, COPPER, ALUMINIUM, CHEMICAL, PAINT, GLASS, PLASTIC, ACKICULTURE INDUSTRIES

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Mr. Sidney O. Raphael RAPHASL SEARLES & VISCHI 770 Lexington Avenue New York, N.Y. 10021

U.S.A.

Y/lotter

Y/Ref.

o/Ref.

15/25

CH-8006 Zurich (Switzerland) Scheuchzerstrasse 7

April 7, 1970

Re: SAGA and Petromar vs. Joseph Müller Corporation

Dear Sidney,

During the recent stay and travellings of the undersigned in the U.S. he was informed that Messrs. SAGA and Petromar in cooperation with Messrs. Gasocéan and Mundogas and/or other companies were apparently trying to arrange that none of these companies and/or other shipowners or brokers would any longer offer us their specialized gas tanker ships for our exports of VCM ex our US exporters and suppliers to various destinations throughout the world. Apparently these companies mentioned above are also trying to internally agree to quote us uncompetitive prices in case a total boycott should not work. This information was passed on to us by:

Mr. Fred Boehm, Director of Marketing, Allied Chemical to Mr. William V. Lawson, President of G.A. Fuller Company and to Mr. Richard Kirk, 521 Fifth Avenue, New York, from where this information was relayed to the undersigned. We also received similar information quite independently over the phone by a certain Mr. Al Hatfield, Commercial Director of B.F. Goodrich Chemical Cleveland. We understood from Mr. Hatfield that certain rumors were going round in shipping circles in the US and elsewhere that our company would no longer be in a position to charter such specialized ships and seemingly these rumors are played very discretely into the hands of large US chemical cooperations and large producers of VCM to discourage them to further offer and sell to us any further VCM tonnages.



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We thought it our duty to keep you informed because as you know an antitrust case is pending against these companies before the U.S. District Court Southern District of New York in which case you act as our attorneys and in which case these companies are already accused of conspiring and monopolizing such VCM shi ments to the disadvantage of US exporter and our company.

We are sending a copy of this letter to the gentlemen mentioned above and in case further information will be needed by the Judge or the U.S. District Court you may feel free to contact the persons mentioned above directly. You are also free and entitled in our name to take whatever action you feel necessary to stop such unfair business attitudes.

Trusting to being of service to you with this information, we remain,

Sincerely yours,

CC: Mr. Al Hatfield, B.F. Goodrich Chemical Cleveland
Mr. James S. Wolff, Sales Manager, B.F. Goodrich Chemical Cleveland

Mr. Fred Boehm, Director of Marketing, Allied Chemical

Mr. William V. Lawson, President of G.A. Fuller Co., New York

Mr. Richard Kirk, New York

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOSEPH MULLER COMPORATION ZURICH,

Plaintiff,

- against -

SOCIETE AMONYME DE GERANCE ET
D'ARMEMENT, PETROMAR SOCIETE
ANONYME, MUNDO GAS, S.A., GAZOCEAN
INTERNATIONAL, S.A., GAZOCEAN FRANCE,
GAZOCEAN U.S.A., JOHN DOE AND RICHARD
ROE, JOHN DOE CORPORATION and RICHARD
ROE CORPORATION, the names of the defendants, JOHN DOE, RICHARD ROE, JOHN
DOE CORPORATION and PICHARD ROE
CORPORATION being fictitious, their
real names and identities presently
unknown to the plaintiff

Defendants.

OPINICH

69 Civ. 4223

JF-40396

FORTEN

APPEARANCES:

BURNS, VAN KIRK, GREENE & KAFER
Attorneys for Plaintiff
521 Fifth Avenue
New York, New York 10017
By: Joseph W. Eurns, Esq.
Of Counsel

SULLIVAN & CROMWELL
Attorneys for Defendant Petromar Societe
Anonyme
46 Well Street
N w York, New York 10005

DONOVAN LEISURE NEWTON & IRVINE
Attorneys for defendant Mundo Gas, S.A.
30 Rockefeller Plaza
New York, New York 10020
By: Sanford M. Litvack & Doris K. Shaw,
Of Counsel
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
Attorneys for defendants Gazocean International
and Gazocean France
120 Broadway
New York, New York
By: Victor S. Friedman and Peter B. Sobel,
Of Counsel

KNAPP, D.J.

These are motions by four defendants pursuant to Rule 41(b) of the Federal Rules of Civil Procedure to dismiss for failure to prosecute. The complaint was filed on September 25, 1969, and two of the defendants were served with reasonable promptness. The moving defendants were not served until December of 1973.

Defendants' claim of prejudice is based on their inability to participate in the attack - ultimately unsuccessful - upon this court's subject matter jurisdiction which was waged by the two defendants who had been served. See <u>Joseph Muller Corp. Zurich v. Societe</u>

Anonyme De Gerance (2d Cir. 1971) 451 F.2d 727, cert. den. 406 U.S. 906. I am not impressed with plaintiff's answer

to this argument, which boils down to the assertion that the other defendants were adequately represented, and that the result would necessarily have been the same no matter what counsel retained by these defendants might have done. Certainly the art of advocacy has not fallen to such low esteem that a party is no longer entitled to assume that a lawyer of its choice might have made a presentation to the court which would have produced a different result than achieved by a lawyer chosen by someone else. On the other hand, I cannot overlook the fact that plaintiff's failure to serve these defendants did not prevent them from appearing in the action (of which they were aware) and participating in the attack on subject matter jurisdiction.

Be that as it may, plaintiff has produced not the slightest rational excuse for its more than four-year delay in effecting service on these defendants. In the circumstances, this case seems to me to be covered by Judge Medina's observation in Messenger v. United States (2d Cir. 1956) 231 F.2d 328, 331:

"The operative condition of the Rule [41(b)] is lack of due diligence on the part of the plaintiff - not a showing by the defendant that it will be prejudiced by denial of its motion."

Plaintiff seeks to distinguish <u>Messenger</u> and other cases cited by defendants. However, plaintiff cites no case where four years of unexcused inaction has been found insufficient to justify dismissal under Rule 41(b).

In the exercise of discretion, the motions are granted; and the case is dismissed as against defendants Gazocean France, Gazocean International, Mundo Gas, and Petromar.

SO ORDERED.

Dated: New York, Hew York

February 25, 1974.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

69 CIV. 4223 (WK)

-against-

FINAL JUDGMENT

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, PETROMAR SOCIETE ANONYME, MUNDO GAS, S.A., GAZOCEAN INTERNATIONAL, S.A., GAZOCEAN FRANCE, GAZOCEAN U.S.A., JOHN DOE and RICHARD ROE, JOHN DOE CORPORATION and RICHARD ROE CORPORATION, the names of the defendants, JOHN DOE, RICHARD ROE, JOHN DOE CORPORATION and RICHARD ROE CORPORATION being fictitious, their real names and identities presently unknown to the plaintiff,

Defendants.

On February 22, 1974 there was heard argument on the motions of the four defendants, Gazocean France, Gazocean International, S.A., Mundo Gas, S.A. and Petromar Societe Anonyme, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure to dismiss this antitrust action as to them on the ground that the plaintiff, Joseph Muller Corporation Zurich, had failed to prosecute the action and by this Court's opinion and order, dated February 25, 1974, their motions were granted and the case dismissed as to them.

On June 5, 1974 the plaintiff filed a motion pursuant to Rule 54(b) of the Federal Rules of Civil Procedure seeking the 118 issuance of a Rule 54(b) Certificate and a Final Judgment. Now

the Court having considered the plaintiff's motion following a hearing on June 14, 1974, it is hereby:

ORDERED, ADJUDGED AND DECREED, that the plaintiff's complaint be dismissed as to the defendants Gazocean France, Gazocean International, S.A., Mundo Gas, S.A. and Petromar Societe Anonyme, and that this Final Judgment be entered as to such defendants.

Dated: New York, New York

1 7

June 25, 1974.

(J) WHITIMAN KMAPP
United States District Judge

JOSEPH MULLER CORPORATION ZURICH.

Plaintiff,

-against- : 69 CIV. 4223 (WK)

RULE 54(b)

CERTIFICATE

SOCIETE ANONYME DE GERANCE ET
D'ARMEMENT, PETROMAR SOCIETE ANONYME,
MUNDO GAS, S.A., GAZOCEAN INTERNATIONAL,
S.A., GAZOCEAN FRANCE, GAZOCEAN U.S.A.,
JOHN DOE and RICHARD ROE, JOHN DOE
CORPORATION and RICHARD ROE CORPORATION,
the names of the defendants, JOHN DOE,
RICHARD ROE, JOHN DOE CORPORATION and
RICHARD ROE CORPORATION being fictitious,
their real names and identities presently
unknown to the plaintiff,

Defendants.

With respect to the issue determined by the Order and Opinion dated February 27, 1974, and the Final Judgment for the defendants, Petromar Societe Anonyme, Mundo Gas S.A., Gazocean International and Gazocean France to which this Certificate is appended, it is certified in accordance with Rule 54(b) Fed. R. Civ. P.

- (1) That the Court has directed the entry of the attached Final Judgment, and
- (2) That the Court has determined there is no just reason for delay of an appeal by the plaintiff on the issue of law that the action be dismissed for failure to prosecute as to the defendants, Petromar Societe Anonyme, Mundo Gas S.A., Gazocean International and Gazocean France.

Dated: New York, New York

June 25, 1974

The Honorable Whitman Knapp United States District Court Room 3004 United States Courthouse Foley Square New York, N. Y.

> Re: Joseph Muller Corporation Zurich v. Societe Anonyme De Gerance et D'Armement, et al. 69 Civ. 4223

Dear Judge Knapp:

In the argument before you on February 22nd, in answer to questions you asked, I referred to certain documents which I stated had been supplied in response to the defendant SAGA's Request for Production of Documents (which we refer to as RPD). I am enclosing a few of these documents in support of plaintiff's position.

RPD 65

May 5, 1971 Raphael letter to Muller

KPD 66

December 10, 1971 Muller letter to Gazocean December 10, 1971 Muller letter to Mundo Gas December 14, 1971 Muller letter to Gazocean The Honorable Whitman Knapp

February 25, 1974

RPD 66 (Cont'd.)

December 14, 1971 Muller letter to Mundo Gas December 22, 1971 Muller letter to Raphael

Respectfully yours,

Joseph W. Burns

JWB:ma Enclosures

cc: Carroll E. Dubuc, Esq.
Sanford M. Litvack, Esq.
Victor S. Friedman, Esq.
Richard E. Carlton, Esq.

LAW OFFICES CABLE RAPHSEL, NEW YORK Ruphart. Seurles & Vischi FLORIDA OFFICE SUITE BZI AINSLEY BUILDING MIAMI, FLA. 33132 SIDNEY O. RAPHAEL 170 Lexington Second SIDNEY Z. SCARLES OSWALD VISCHI New York, N.Y. 10021 ROBERT & SCHER WILLIAM T. GLOVER (212) 832 -7700 EDMUND P D'ELIA EMANUEL SOBEL BENJAMIN GASSMAN THEODORE S LITE COUNSEL AARON H SOBEL AVRAM H. SCHREIBER May ... 5, 1971 Mr. Joseph Muller, Scheuchzerstrasse 7, Zurich, Switzerland 8006 Re: Joseph Muller Corporation v. SAGA, et al (Your letter 4/28/71) Dear Joe: We have yours of the 28th ult. re. the above, accompanied by copies of letters, and a bulletin issued by Phillips Petroleum. dated August 14, 1970, which would indicate quite clearly that we were so right when we started the anti-trust case, in assuming the pattern of dealing which SAGA had embarked upon, and which we assumed at the time was in part responsible for the anti-trust violations which were committed when your contractual commitments with them were reached. however, in view of what has transpired since, these assumptions seem to be borne out by a revelation of the evidence which quite adequately supports it. I am quite sure that when our anti-trust position is upheld by the

I am quite sure that when our anti-trust position is upheld by the U. S. Court of Appeals, and we get to the point of launching our examinations before trial and the discovery of records and documents, we will be more than able to substantiate a valid claim against the defendants. In the meantime, if you receive any additional evidence, I am sure you will forward it on to us.

WE on our part of course, and as per your suggestion, are keeping in touch with Mr. Kirk so that we can all coordinate our our joint efforts in the same direction.

Sincerely yours,

SIDNEY O. RAPHAEL

SOR: PD

GAZOCEAN S.A. 21. Avenue George-V F-75 Peris (8°)

Ky/28/2028

December 10, 1971

Dear Sirs,

Re: Vinyl Chloride Monomer (VCM)

We are interested in your firm proposal for the transportation of approx. 30-50.000 m.t. VCH per year from one safe borth U.S. Gulf to one safe borth UK/Continent in lots of 2.000 - 4.000 m.t. starting January 1972.

Furthermore we would need a storage vessel for the European discharge port (similar to "Monomer Venture" of Fundo Gas) for the reception and storage of each shipment which should be offered jointly with the above transportation, if possible. We could possibly also be interested in buying an old LPG-vessel for the storage if you can provide much ship. A combination of the transportation and storage vessel would be ideal and we ask you to do your utmost to get the necessary facilities for us.

As this matter is rather urgent we would appreciate to receive your telex on receipt of this letter detailing your proposal.

Looking forward to your prompt reply we remain,

Yours faithfully,
JOSEPH MUELLER CORPORATION ZUERICH

F. Koormans Vice President, harketing

MUNDO GAS S.A. P.O. Box 1177 Belvedere Duilding HAMILTON / BERNUDA

Ky/23/2028

December 10, 1971

Gentlemen:

Re: Vinyl Chloride Monomer (VCM)

We are interested in your firm proposal for the transportation of approx. 30-50.000 m.t. VCM per year from one safe berth U.S. Gulf to one safe berth U.K./Continent in lots of 2.000 - 4.000 m.t. starting January 1972.

Furthermore, we would need a storage vessel for the European discharge port for the reception and storage of each shipment which should be offered jointly with the above transportation, if possible. We understand that you have various storage vessels evailable and consequently feel that such combination would be ideal to your Company.

As this matter is rather urgent we would appreciate to receive your telex on receipt of this letter detailing your proposal.

Looking forward to your prompt reply we remain,

Very truly yours,

JOSEPH MUELLER CORPORATION ZUERICH

F. Kooymans
Vice Fresident, Marketing

GAZOCEAN S.A. 21, Avenue George-V

F-75 Paris So France

Ky/23/2013

December 14, 1971

Dear Sirs,

Re: Vinyl Caloride Honomer (VCI)

Please quote firm by telex on reweipt of this letter with all major terms and conditions for one addition of

approx. 900 m.t. VGH, alternatively about 2,800 m.t. or full cargo other similar size, 10 % more or less at captain's option, from one safe borth U.S. Gulf NOLA reage including Plaquendne and Port Allen, La. to one safe borth West Mediterranean port.

Shipment to be made on your next vessel sailing from U.S. Gulf. Laydays to be indicated in your firm offer.

As this ratter is rather urgent we would appreciate to receive your offer by telex ismediately if you are interested in raking this hidpment which may be followed by more into the hediterranean if you cooperate at this stage.

We are at your complete disposal with any further explanations you may wish to obtain and remain,

Yours faithfully,
JOLEPH MUELLER CORPORATION ZUERICH

MANDO GAS S.A.
P.O. Box 1177
Belvedere Building
HANTLEON / MERMADA

12/23/2013

December 14, 1971

Centlemen:

Re: Vinyl Chloride Conomer (VCI)

Please quote firm by telex on receipt of this letter with all major terms and conditions for one shippent of

approx. 900 m.t. VCI, alternatively about 2,000 m.t. or full cargo other similar size, 10.5 more or less at captain's option, from one safe berth U.S. Gulf MOLA runge including Plaquemine and Fort Allen, La. to one safe berth West Mediterranean port.

Shipment to be unde on your next vessel sailing from U.S. Gulf. Laydays to be indicated in your firm offer.

As this matter is rather urgent we would appreciate to receive your offer by telem immediately if you are interested in making this shipment which may be followed by more into the Mediterranean if you cooperate at this stage.

We are at your complete disposal with any further explanations you may wish to obtain and remain,

Yours faithfully,
JOSEPH MUELLER CORPORATION ZUERICH

Mr. Sidney O. Raphael,
RAPHAEL, SEARIES & VISCHI,
770 Lexington Avenue,
NEW YORK, N.Y. 10021
U. S. A.

Ky/28

December 22, 1971

Dear Mr. Raphael:

Re: JMC v. SACA, MULIDOGAS, GAZOCEAN

Mr. Joseph Miller asked me recently to send out inquiries for freight offers to Messrs. Mundogas and Cazcean in order to see whether these companies are now willing to quote us competitive freight rates after they also lost their appeal before the U.S. Court of Appeal in New York.

I am enclosing copies of my inquiries to above companies dated December 10 and 14, 1971 which are self-explanatory. You may be interested to learn that neither of these companies enswered or even quoted so far which should be additional evidence that they continue to conspire against our company to our and our U.S. suppliers damage and disadvantage.

We are wondering what could be done to force these people to stop such conspiracy they apparently continue to do.

Hoping to be of service to you and wishing you and your family a Merry Christmas and Happy and Prosperous New Year, I remain with best personal regards,

Encls. mentioned

Sincerely yours,
JOSEPH MUELLER CORPORATION ZUERICH

F. Kooymans

Vice President, Marketing